

**HJR**

**40**

<TARGET><BILL>HJR 40</BILL><SUBJECT>HJR  
40</SUBJECT><COMM>HRES27</COMM></TARGET>

27-LS1407\B  
Bullock  
3/30/12

**CS FOR HOUSE JOINT RESOLUTION NO. 40( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-SEVENTH LEGISLATURE - SECOND SESSION**

**BY**

**Offered:**  
**Referred:**

**Sponsor(s): REPRESENTATIVES KELLER, Tammie Wilson, Pruitt, Thompson, Millett, Costello, Johansen, Muñoz, Peggy Wilson**

**A RESOLUTION**

1 **Commending the governor and the administration for aggressively working to protect**  
2 **the interests of the state in rights-of-way under R.S. 2477; urging the governor and the**  
3 **attorney general to develop a working alliance with the governors, attorneys general,**  
4 **and legislatures in other western states to protect and enforce the states' interests in**  
5 **ensuring access using rights-of-way authorized by R.S. 2477; urging the governor and**  
6 **the attorney general to support the interests of the State of Utah and southern counties**  
7 **of Utah in R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-**  
8 **of-way through various means, including initiating litigation in this state; urging the**  
9 **governor and the attorney general to develop a strategy for resolving the dispute over**  
10 **the right to continued access using R.S. 2477 rights-of-way in the state, including the**  
11 **possibility of bringing lawsuits against the federal government to preserve the state's**  
12 **interest in rights-of-way; urging the governor to further strengthen the resources of the**  
13 **state for protecting the state's rights by continuing to focus the efforts of the Department**

1 of Law, the Department of Natural Resources, the Department of Fish and Game, and  
2 other departments on defending the state's rights and powers with regard to access and  
3 federalism issues; urging the United States Congress to enact legislation requiring  
4 federal agencies with land management authority to establish a process to recognize  
5 valid R.S. 2477 rights-of-way claims expeditiously after a notice of intent to claim an  
6 R.S. 2477 right-of-way has been filed without the need to dispute those claims in court  
7 and to participate in good faith in the process.

8 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

9 **WHEREAS**, in 1866, R.S. 2477 granted rights-of-way across unappropriated federal  
10 land to encourage the development of western land; and

11 **WHEREAS** R.S. 2477 rights-of-way were perfected by simple use or development;  
12 and

13 **WHEREAS** R.S. 2477 rights-of-way were established in the state through use or  
14 development until virtually all federal land in the state was withdrawn in 1969; and

15 **WHEREAS**, when R.S. 2477 was repealed in 1976 under the Federal Land Policy  
16 Management Act (43 U.S.C. 1701), valid existing rights under R.S. 2477 were expressly  
17 protected; and

18 **WHEREAS** the Alaska State Legislature has recognized 602 rights-of-way in statute,  
19 and the Department of Natural Resources has identified at least 67 additional valid R.S. 2477  
20 rights-of-way; and

21 **WHEREAS** historic R.S. 2477 rights-of-way represent a key component of the  
22 mandate in art. VIII, sec. 1, of the Constitution of the State of Alaska to encourage the  
23 settlement of the state's land and the development of the state's land and resources; and

24 **WHEREAS** the United States Department of the Interior and the United States Forest  
25 Service refuse to recognize an R.S. 2477 right-of-way unless adjudicated and validated in a  
26 decision by a court of competent jurisdiction; and

27 **WHEREAS** unilateral resistance by the federal government to the existence of the  
28 state's rights-of-way causes great harm to the ability of the state to execute its duty to manage

1 state resources by making them accessible and available for maximum use consistent with the  
2 public interest, as required in art. VIII, sec. 1, of the Constitution of the State of Alaska; and

3 **WHEREAS** the State of Utah recently filed notices of intent to sue to enforce its  
4 interests in more than 18,000 R.S. 2477 rights-of-way in that state; and

5 **WHEREAS** the State of Alaska and the State of Utah share similar objections to the  
6 large withdrawals of Federal Conservation Units that are managed by the United States  
7 Department of the Interior and the United States Forest Service, agencies that both  
8 unilaterally deny the existence of valid state easements; and

9 **WHEREAS** virtually all of the state's natural resource development projects are  
10 unnecessarily burdened by numerous federal laws, including the Endangered Species Act, the  
11 Clean Water Act, and myriad arbitrary federal regulators and policies implementing and  
12 enforcing those and other federal laws;

13 **BE IT RESOLVED** that the Alaska State Legislature commends the governor and the  
14 administration for aggressively working to protect the interests of the state in rights-of-way  
15 under R.S. 2477 and urges the governor and the attorney general to develop a working  
16 alliance with the governors, attorneys general, and legislatures in other western states to  
17 protect and enforce the states' interests in ensuring access using rights-of-way authorized by  
18 R.S. 2477; and be it

19 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the  
20 attorney general to support the interests of the State of Utah and southern counties of Utah in  
21 R.S. 2477 rights-of-way by actively seeking confirmation of R.S. 2477 rights-of-way through  
22 various means, including initiating litigation in this state; and be it

23 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the  
24 attorney general to develop a strategy for resolving the dispute over the right to continued  
25 access using R.S. 2477 rights-of-way in the state, including the possibility of bringing  
26 lawsuits against the federal government to preserve the state's interest in rights-of-way; and be  
27 it

28 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor further  
29 to strengthen the resources of the state for protecting the state's rights by continuing to focus  
30 the efforts of the Department of Law, the Department of Natural Resources, the Department  
31 of Fish and Game, and other departments on defending the state's rights and powers with

1 regard to access and federalism issues; and be it

2 **FURTHER RESOLVED** that the Alaska State Legislature urges the United States  
3 Congress to enact legislation requiring federal agencies with land management authority to  
4 establish a process to recognize valid R.S. 2477 rights-of-way claims expeditiously after a  
5 notice of intent to claim an R.S. 2477 right-of-way has been filed without the need to dispute  
6 those claims in court and to participate in good faith in the process.

7 **COPIES** of this resolution shall be sent to the Honorable Barack Obama, President of  
8 the United States; the Honorable Joseph R. Biden, Jr., Vice-President of the United States and  
9 President of the U.S. Senate; the Honorable Ken Salazar, United States Secretary of the  
10 Interior; the Honorable John Boehner, Speaker of the U.S. House of Representatives; the  
11 Honorable Nancy Pelosi, Minority Leader of the U.S. House of Representatives; the  
12 Honorable Harry Reid, Majority Leader of the U.S. Senate; the Honorable Mitch McConnell,  
13 Minority Leader of the U.S. Senate; the Honorable Jeff Bingaman, Chair of the Energy and  
14 Natural Resources Committee of the U.S. Senate; the Honorable Gary R. Herbert, Governor  
15 of Utah; Kathy Davis, Assistant Attorney General, State of Utah, Office of the Attorney  
16 General, Division of Public Lands; the Honorable Lisa Murkowski and the Honorable Mark  
17 Begich, U.S. Senators, and the Honorable Don Young, U.S. Representative, members of the  
18 Alaska delegation in Congress; and all other members of the 112th United States Congress.

27-LS1407M  
Bullock  
3/29/12

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5 **ensuring access using rights-of-way authorized by R.S. 2477; [urging the governor and**  
6 **the attorney general to support the State of Utah and southern counties of Utah in a**  
7 **lawsuit to enforce Utah's interests in R.S. 2477 rights-of-way by actively seeking**  
8 **confirmation of R.S. 2477 rights-of-way through various means, including initiating**  
9 **litigation; ]urging the governor and the attorney general to develop a strategy for**  
10 **resolving the dispute over the right to continued access using R.S. 2477 rights-of-way in**  
11 **the state, including the possibility of bringing lawsuits against the federal government to**  
12 **preserve the state's interest in rights-of-way; urging the governor to further strengthen**  
13 **the resources of the state for protecting the state's rights by continuing to focus the**

1 efforts of the Department of Law, the Department of Natural Resources, the  
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3 and powers with regard to access and federalism issues; urging the United States  
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19 **FURTHER RESOLVED** that the Alaska State Legislature urges the governor and the  
20 attorney general to support the State of Utah and southern counties of Utah <sup>in</sup> a lawsuit to  
21 enforce Utah's interests <sup>in</sup> R.S. 2477 rights-of-way by actively seeking confirmation of R.S.  
22 2477 rights-of-way through various means, including initiating litigation; and be it *in the State of Alaska.*

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L

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# ALASKA STATE LEGISLATURE

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**Session:**

State Capitol Building  
Juneau, Alaska 99801-1182  
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## REPRESENTATIVE WES KELLER DISTRICT 14

### SPONSOR STATEMENT

#### HJR 40

#### “RS 2477 RIGHTS-OF-WAY”

House Joint Resolution 40 is the next step in moving transportation corridors forward in Alaska. All across the state there are hundreds of traditional trails and routes that have been used for centuries. These corridors are a critical part of how we will transport goods and services in the future.

Even Congress recognized that when it enacted and repealed Revised Statute 2477's that these trails have the tradition and need to be continued and even expanded to improve commerce. In several states across the west, including Alaska the repeal included language allowing the identification of existing potential RS 2477's as they have become to be called.

So far Alaska has identified 670 right-of ways that clearly qualify. These are part of the more than 20,000 R.S. 2477s already identified in the West. The problem now is convincing the federal government to release these to the states.

This resistance by Federal departments has resulted in the state's having to take the issue to court. Presently the lead suit is Utah and Alaska needs to join in that effort with a minimum of an amicus brief.

This resolution commends the administration for its efforts so far and also directs it to continue its efforts by supporting Utah's lawsuit. It also raises the current Alaska bar by asking the Governor to provide a request to the next legislature for specific funding to continue the RS 2477 efforts.

Without this effort commerce in Alaska will continue to be expensive and nearly impossible. RS 2477s are a critical key that cannot be ignored.

E-Mail: [Representative Wes Keller@legis.state.ak.us](mailto:Representative_Wes_Keller@legis.state.ak.us)  
Call Juneau Toll free: (800) 468-2186  
Website: [www.akrepublicans.org/keller/](http://www.akrepublicans.org/keller/)

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IN THE SENATE OF THE UNITED STATES.

JULY 19, 1866.

Ordered to be printed.

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## **AMENDMENT**

Reported by Mr. STEWART, from the Committee on Public Lands, to the act (H. R. 365) granting the right of way to ditch and canal owners over the public lands in the States of California, Oregon, and Nevada, viz: Strike out all after the enacting clause, and insert as follows:

3 That the mineral lands of the public domain, both surveyed  
and unsurveyed, are hereby declared to be free and open to  
5 exploration and occupation by all citizens of the United  
6 States, and those who have declared their intention to become  
7 citizens, subject to such regulations as may be prescribed by  
8 law, and subject also to the local custom or rules of miners  
9 in the several mining districts, so far as the same may not be  
10 in conflict with the laws of the United States.

1       SEC. 2. *And be it further enacted,* That whenever any  
2 person or association of persons claim a vein or lode of quartz,  
3 or other rock in place, bearing gold, silver, cinnabar, or cop-  
4 per, having previously occupied and improved the same

5 according to the local custom or rules of miners in the district  
6 where the same is situated, and having expended in actual  
7 labor and improvements thereon an amount of not less than  
8 one thousand dollars, and in regard to whose possession there  
9 is no controversy or opposing claim, it shall and may be law-  
10 ful for said claimant or association of claimants to file in the  
11 local land office a diagram of the same, so extended laterally  
12 or otherwise as to conform to the local laws, customs, and  
13 rules of miners, and to enter such tract and receive a patent  
14 therefor, granting such mine, together with the right to fol-  
15 low such vein or lode with its dips, angles, and variations, to  
16 any depth, although it may enter the land adjoining, which  
17 land adjoining shall be sold subject to this condition.

1       SEC. 3. *And be it further enacted,* That upon the filing  
2 of the diagram as provided in the second section of this act,  
3 and posting the same in a conspicuous place on the claim,  
4 together with a notice of intention to apply for a patent, the  
5 register of the land office shall publish a notice of the same  
6 in a newspaper published nearest to the location of said claim,  
7 and shall also post such notice in his office for the period of  
8 ninety days; and after the expiration of said period, if no  
9 adverse claim shall have been filed, it shall be the duty of  
10 the surveyor general, upon application of the party, to survey  
11 the premises and make a plat thereof, indorsed with his ap-  
12 proval, designating the number and description of the loca-

13 tion, the value of the labor and improvements, and the  
14 character of the vein exposed; and upon the payment to the  
15 proper officer of five dollars per acre, together with the cost  
16 of such survey, plat, and notice, and giving satisfactory evi-  
17 dence that said diagram and notice have been posted on the  
18 claim during said period of ninety days, the register of the  
19 land office shall transmit to the General Land Office said plat,  
20 survey, and description; and a patent shall issue for the same  
21 thereupon. But said plat, survey, or description shall in no  
22 case cover more than one vein or lode, and no patent shall  
23 issue for more than one vein or lode, which shall be expressed  
24 in the patent issued.

1       Sec. 4. *And be it further enacted,* That when such  
2 location and entry of a mine shall be upon unsurveyed lands,  
3 it shall and may be lawful, after the extension thereto of the  
4 public surveys, to adjust the surveys to the limits of the  
5 premises according to the location and possession and plat  
6 aforesaid, and the surveyor general may, in extending the  
7 surveys, vary the same from a rectangular form to suit the  
8 circumstances of the country and the local rules, laws, and  
9 customs of miners: *Provided,* That no location hereafter  
10 made shall exceed two hundred feet in length along the vein  
11 for each locator, with an additional claim for discovery to the  
12 discoverer of the lode, with the right to follow such vein to  
13 any depth, with all its dips, variations, and angles, together

14 with a reasonable quantity of surface for the convenient  
15 working of the same as fixed by local rules: *And provided*  
16 *further*, That no person may make more than one location  
17 on the same lode, and not more than three thousand feet shall  
18 be taken in any one claim by any association of persons.

1       *SEC. 5. And be it further enacted*, That as a further  
2 condition of sale, in the absence of necessary legislation by  
3 Congress, the local legislature of any State or Territory may  
4 provide rules for working mines involving easements, drain-  
5 age, and other necessary means to their complete develop-  
6 ment; and those conditions shall be fully expressed in the  
7 patent.

1       *SEC. 6. And be it further enacted*, That whenever any  
2 adverse claimants to any mine located and claimed as afore-  
3 said, shall appear before the approval of the survey, as pro-  
4 vided in the third section of this act, all proceedings shall be  
5 stayed until a final settlement and adjudication in the courts  
6 of competent jurisdiction of the rights of possession to such  
7 claim, when a patent may issue as in other cases.

1       *SEC. 7. And be it further enacted*, That the President  
2 of the United States be, and is hereby, authorized to establish  
3 additional land districts and to appoint the necessary officers  
4 under existing laws, wherever he may deem the same neces-  
5 sary for the public convenience in executing the provisions  
6 of this act.

1       SEC. 8. *And be it further enacted,* That the right of  
2 way for the construction of highways over public lands, not  
3 reserved for public uses, is hereby granted.

1       SEC. 9. *And be it further enacted,* That whenever, by  
2 priority of possession, rights to the use of water for mining,  
3 agricultural, manufacturing, or other purposes, have vested  
4 and accrued, and the same are recognized and acknowledged  
5 by the local customs, laws, and the decisions of courts, the  
6 possessors and owners of such vested rights, shall be main-  
7 tained and protected in the same; and the right of way for  
8 the construction of ditches and canals for the purposes afore-  
9 said is hereby acknowledged and confirmed: *Provided, how-*  
10 *ever,* That whenever, after the passage of this act, any person  
11 or persons shall, in the construction of any ditch or canal,  
12 injure or damage the possession of any settler on the public  
13 domain, the party committing such injury or damage shall be  
14 liable to the party injured for such injury or damage.

1       SEC. 10. *And be it further enacted,* That wherever, prior  
2 to the passage of this act, upon the lands heretofore designated  
3 as mineral lands, which have been excluded from survey and  
4 sale, there have been homesteads made by citizens of the  
5 United States, or persons who have declared their intention  
6 to become citizens, which homesteads have been made, im-  
7 proved, and used for agricultural purposes, and upon which  
8 there have been no valuable mines of gold, silver, cinnabar

9 or copper discovered, and which are properly agricultural  
10 lands, the said settlers or owners of such homesteads shall  
11 have a right of pre-emption thereto, and shall be entitled to  
12 purchase the same at the price of one dollar and twenty-five  
13 cents per acre, and in quantity not to exceed one hundred and  
14 sixty-acres ; or said parties may avail themselves of the pro-  
15 visions of the act of Congress approved May twenty, eigh-  
16 teen hundred and sixty-two, entitled " An act to secure  
17 homesteads to actual settlers on the public domain," and acts  
18 amendatory thereof.

1        *SEC. 11. And be it further enacted,* That upon the sur-  
2 vey of the lands aforesaid, the Secretary of the Interior may  
3 designate and set apart such portions of the said lands as are  
4 clearly agricultural lands, which lands shall thereafter be sub-  
5 ject to pre-emption and sale as other public lands of the United  
6 States, and subject to all the laws and regulations applicable  
7 to the same.

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This document was prepared by Kerby Jackson  
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Document prepared: December 16<sup>th</sup>, 2010

# Fact Sheet

## Title: R.S. 2477 Rights-of-Way



Alaska Department of  
**NATURAL  
RESOURCES**

Division of Mining, Land & Water  
September 2001

**This fact sheet explains the origin of a century-old mining law that has broad implications for Alaska's future. It is intended to illustrate the potential this law has in helping preserve Alaska's public access options for the future.**

### ***What is R.S. 2477?***

Revised Statute 2477 is found in section 8 of the Mining Law of 1866. It granted states and territories unrestricted rights-of-way over federal lands that had no existing reservations or private entries. The law remained in effect until Congress repealed it in 1976. In Alaska, the opportunity to establish new R.S. 2477 rights-of-way generally ended December 14, 1968, when the federal government issued PLO 4582—the “land freeze”—to prepare for settlement of Alaska Native land claims. Though no new rights-of-way could be established after federal land was reserved or appropriated, or after the law was repealed in 1976, these actions did not extinguish pre-existing rights.

Revised Statute 2477 states: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

### ***What did Congress mean by “highways”?***

It's important to distinguish the historical meaning of “highways” from the modern. The word “highway” was historically used to refer to foot trails, pack trails, sled dog trails, crudely built wagon roads, and other corridors for transportation. R.S. 2477 was included in the first comprehensive mining law and was used initially by miners and homesteaders on federal land. The broad wording of the law does not limit the type of right-of-way to which it applies.

Alaska Statute 19.45.001(9) defines a highway to include “a highway (whether included in primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof...”

### ***What does this mean for Alaskans?***

R.S. 2477 rights-of-way could be established in Alaska from 1884 (the Organic Act, which extended general land laws to the new territory), to 1968 (PLO 4582). From its territorial origins to today, Alaska has consisted mainly of federally owned land. During its 84 years of application in this state, many rural mail routes, mining trails, and other transportation routes became R.S. 2477's through construction and/or use. The State of Alaska, Department of Natural Resources

has documented hundreds of historic routes that qualify as R.S. 2477 rights-of-way. Surface transportation between Alaska's hundreds of rural communities and other resource destinations still relies heavily on our cross-country trails, primarily used in the winter by snowmachines, dogsled teams, and four-wheel all-terrain vehicles.

### ***What are some examples of R.S. 2477's?***

Some examples include DeBarr Road in Anchorage and Farmer's Loop Road in Fairbanks. Other routes that the State believes to qualify as R.S. 2477's include the Stampede Trail in Denali National Park and Preserve, the Nabesna-Chisana Trail in Wrangell-St. Elias National Park, the Dalton Trail in the vicinity of Haines, the Eureka-Rampart Trail in the Interior, and the Chilkoot Trail near Skagway.

### ***How many R.S. 2477 rights-of-way have been asserted?***

While hundreds of R.S. 2477's have been validated within the western states, only a handful of routes have been cooperatively validated in Alaska with BLM. During 1993-1995, the Department of Natural Resources' R.S. 2477 Project researched more than one thousand trails. The project found that some 600 of these qualified as R.S. 2477 rights-of-way under state standards. In 1998 the Legislature listed these trails in AS 19.30.400, stating that they had been accepted as R.S. 2477 rights-of-way. That same legislation requires the department to continue researching trails and to prepare an annual report identifying those found to qualify as R.S. 2477's. Many additional trails have been reported to the Legislature since then.

### ***What if land has been conveyed without specifying that there is a valid R.S. 2477 right-of-way across it?***

In Alaska, millions of acres once controlled by the federal government have been transferred to Native corporations or into other private ownership. Land conveyances are always subject to “valid existing rights.” Courts have ruled that where an R.S. 2477 right-of-way exists, the new landowner's title is subject

to the right-of-way, which must still be honored. There are many Alaskan land owners who want the assurance that their rights and interests will not be adversely affected in the process of R.S. 2477 identification and platting. The Alaska Legislature instructed in its 1998 law that, while providing for the public's right to use these historic access easements, "every effort should be made to minimize the effect on the affected private property owners."

#### **What is some of the R.S. 2477 case law?**

One of the most frequently quoted cases affecting R.S. 2477 is Hamerly v. Denton, decided in 1961. The court clearly explained that R.S. 2477 was one-half of a grant—an offer to dedicate an easement across unreserved, unappropriated federal land. That offer of a right-of-way grant could be accepted by either of two methods:

- a) By "some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention" to accept it; or
- b) By "public user for such a period of time and under such conditions as to prove that the grant has been accepted."

Additionally, Girves v. Kenai Peninsula Borough, 1975, established that some section-line easements are R.S. 2477's. Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9<sup>th</sup> Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases.

#### **What are the rules for using R.S. 2477 rights-of-way?**

Some rights-of-way will likely be improved for access to valuable state resources, communities, and land. Others will be used as they have been in the past. Some might not be used at all, or might be developed only as foot trails. If you are not sure whether a trail you want to use is an R.S. 2477 right-of-way, check public land records and consult with each land owner or managing agency before crossing the property. Typically R.S. 2477 rights-of-way are available for public use under DNR's regulations. DNR's management rules can be found in DNR's recently revised chapter of public easement regulations, 11 AAC 51. However, the Department of Transportation and Public Facilities' regulations apply to R.S. 2477 rights-of-way that are part of the Alaska Highway System or that DNR has otherwise transferred to that department. In some cases, the State might transfer management of an R.S. 2477 right-of-way to a city or

borough, but without giving it the right to "vacate" or officially erase the right-of-way. That is because municipalities are prohibited by law from vacating R.S. 2477 rights-of-way.

#### **For additional information:**

An R.S. 2477 Atlas is available for purchase at the DNR Public Information Offices in Anchorage, Fairbanks, and Juneau. The Atlas lists approximately 560 routes, identified and located on map inserts. The department has also made documentation on many qualifying R.S. 2477 routes available at the State and University Archives.

Another source is DNR's website on R.S. 2477 rights-of-way, <http://www.dnr.state.ak.us/mlw/trails/rs2477/>

From that site you can reach a map of Alaska that links to descriptions of many R.S. 2477 trails. In addition, if you know the official "RST" number of any R.S. 2477 right-of-way, you can find its complete casefile documentation and description in DNR's public land records at

<https://nutmeg.state.ak.us/ixpress/dnr/case/RequestRpt.dml>

These two websites provide the most up-to-date R.S. 2477 information available. You can find RST numbers of more than 600 routes, cross-referenced by trail name, in AS 19.30.400. For RST numbers of additional routes that DNR has documented since that law was passed in 1998, check DNR's annual reports to the legislature. All of the sources mentioned here are public documents that everyone has a right to see.

#### **For further information or to buy an Atlas, contact:**

Dept. of Natural Resources  
Public Information Center  
550 W. 7<sup>th</sup> Ave. # 1260  
Anchorage, AK 99501-3557  
(907) 269-8400

Div. of Mining, Land and  
Water Public  
Information Office  
400 Willoughby Ave.,  
Suite 400  
Juneau, AK 99801  
(907) 465-3400

Public Information Center  
3700 Airport Way  
Fairbanks, AK 99709-4699  
(907) 451-2705

**BLM Administrative Determinations on R.S. 2477 Rights-of-Way**

Section 8 of the Mining Act of 1866 provided: "and be it further enacted, that the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The statute was self enacting; rights being established by "construction" of a "highway" on unreserved public lands, without any form of acknowledgement or action by the Federal government. This section of the statute was later re-codified as Revised Statute 2477. R.S. 2477 was repealed by FLPMA on October 21, 1976, with a savings provision for rights established prior.

The BLM does not have the authority to make binding determinations on the validity of R.S. 2477 right-of-way claims. The BLM may, however, make informal, non-binding, administrative determinations for its own land use planning and management purposes. Such determinations must be based in the particular laws of each state in which a claimed right-of-way is situated. In Utah, applicable State code provided for the acceptance of a right-of-way pursuant to R.S. 2477 across public lands not reserved for public purposes when a right-of-way had been used by the public for a continuous 10 year period.

As of February 2009, the BLM has been directed not to process or review any claims under R.S. 2477 pending further review and direction from the Secretary of the Interior.

**Revised Statute 2477** (commonly known as "RS 2477") was enacted by the United States Congress in 1866 to encourage the settlement of the Western United States by the development of a system of highways. Its entire text is one sentence: "the right-of-way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."

The original grant did not require being recorded, meaning it was self enacting, and in 1866 constructing a road often meant using a trail many times and perhaps filling low places, moving rocks and placing signs.

It granted to counties and states a right-of-way across federal land when a highway was built.

RS 2477 was repealed in 1976 under the Federal Land Policy and Management Act (FLPMA). The repeal was subject to "valid existing rights." The relevant text (Sec. 701. 43 U.S.C. 1701) reads (a) "Nothing

in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act" <sup>[1]</sup>.

## **Controversy**

Shared-access advocates claim that neither the BLM, Forest Service nor other federal agencies, nor even private landowners have the authority to close RS 2477 roads. Their interpretation of the statute has brought them into conflict with wilderness advocates, the federal government and private landowners.

## **Conflicts on Federal Lands**

RS 2477 has become an issue for wilderness advocacy groups because of language in the Wilderness Act of 1964. According to Section 2 (c) 3, any area to be considered for wilderness status must contain "a least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition." Section 4 (c) further specifies, "Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act" <sup>[2]</sup>. Thus an RS 2477 "highway" which qualifies as a "road" could disqualify the land it traverses from being recognized by the federal government as a "wilderness" if it reduced the area under consideration beneath the 5,000 acre limit.

Access advocates have sometimes organized to reopen or maintain what they consider to be legitimate RS 2477 roads <sup>[3]</sup>. The Jarbidge Shovel Brigade is the best-known group that was formed for this purpose.

Landowners, environmental organizations, government organizations (federal, state and county) and recreational-use advocates have very different understandings of the law. Conflicts among these groups came to a head when President Bill Clinton declared the Grand Staircase-Escalante, in southern Utah, to be a National Monument. Several Utah counties have been fighting in court to assert RS 2477 claims to roads that cross federal and private property (see *SUWA v BLM*), including across the Grand Staircase-Escalante National Monument.

Interior Secretary Ken Salazar recently authorized interior representatives to negotiate federal recognition of RS 2477 roads for

which there is a clear historical record <sup>[4]</sup>. In August 2010, quiet title of the Skutumpah Road, within the Grand Staircase-Escalante National Monument, (see Kane County, Utah v United States) was granted to Kane County, Utah <sup>[5]</sup>.

### **Conflicts on Private Lands**

As western lands become developed into residential subdivisions, motorized recreationists and sportsmen are continuing to claim access rights on privately-constructed, -owned, and -maintained roads that cross private land and gated communities. Because some disputed roads were never recorded by counties, shared-access groups claim that private landowners hold property with an unrecorded public right-of-way. Property rights advocates say that failure to record a right-of-way means that there was no intention to create a public right.

Shared-access groups argue that lack of formal action by counties does not diminish the public's easement/usufruct rights through private lands. They have engaged in threats, trespassing, and vandalism <sup>[6]</sup> to vigorously assert those rights.

Private property activists claim that nobody has access rights without a recorded easement. Shared-access activists claim that virtually all private land that used to be public can legally be traversed by the public. There is little common ground between these interpretations, so lawsuits are being fought in the western United States, and it has fallen to the courts to determine which routes are public and which are not.

Courts have applied state laws, federal laws, and federal land court rulings to resolve RS 2477 claims. Recent examples of failed attempts to assert RS 2477 rights on private property are Galli v. Idaho County (Case Number CV 36692, Second Judicial District of Idaho, 2006) and Ramey v. Boslough (Case Number 02-CV-582, Boulder County District Court, 20th Judicial District of Colorado, 2007).



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United States General Accounting Office  
Washington, DC 20548

B-300912

February 6, 2004

The Honorable Jeff Bingaman  
Ranking Minority Member  
Committee on Energy and Natural Resources  
United States Senate

Subject: Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah

Dear Senator Bingaman:

This responds to your request for our opinion on actions by the Department of the Interior (the Department or DOI) in recognizing rights-of-way across public lands granted by Revised Statute 2477 (R.S. 2477), through use of a Federal Land Policy and Management Act (FLPMA) disclaimer-of-interest process which the Department has incorporated into a Memorandum of Understanding with the State of Utah (Utah MOU). Specifically, this opinion addresses:

(1) Whether either the Department's January 2003 amendments to its disclaimer-of-interest regulations implementing FLPMA § 315, 43 U.S.C. § 1745 (2003 Disclaimer Rule),<sup>1</sup> or the Utah MOU entered into in April 2003<sup>2</sup> is a "final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]" prohibited from taking effect by section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108); and, independent of this Section 108 prohibition,

(2) Whether the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

Your request raises a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As summarized below and detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the

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<sup>1</sup> "Conveyances, Disclaimers and Correction Documents," 68 Fed. Reg. 494 (Jan. 6, 2003).

<sup>2</sup> Memorandum of Understanding Between The State of Utah and The Department of the Interior On State and County Road Acknowledgment (Apr. 9, 2003).

2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

In preparing this opinion, we requested the legal views of the Department on the issues raised by your request. We obtained these views through the Department's written responses to our inquiries, an in-person conference, and a number of telephone interviews with the Department's legal staff. We also reviewed the Department's responses to separate inquiries by you and by Senator Lieberman on these matters,<sup>3</sup> as well as the Department's statements in various regulatory and policy documents and reports.

### BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477. Congress repealed R.S. 2477 in 1976 as part of its enactment of FLPMA, along with the repeal of other federal statutory rights-of-way, but it expressly preserved R.S. 2477 rights-of-way that already had been established. In its entirety, R.S. 2477 provided that:

“the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”<sup>4</sup>

R.S. 2477 was self-executing and did not require government approval or public recording of title. As a result, uncertainty arose regarding whether particular rights-of-way had in fact been established. This uncertainty, which continues today, has implications for a wide range of entities, including the Department and other federal agencies, state and local governments who assert title to R.S. 2477 rights-of-way, and those who favor or oppose continued use of these rights-of-way. In an effort to resolve questions regarding the existence of particular R.S. 2477 rights-of-way, the Department has issued a series of policy and other documents over the years discussing how it would administratively recognize or validate specific rights-of-way. By 1993, according to the Department, the agency and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across Bureau of Land Management

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<sup>3</sup> See Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Jeff Bingaman (June 19, 2003), responding to Senator Bingaman's April 21, 2003 Letter to the Secretary of the Interior; Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Joseph Lieberman (Sept. 22, 2003), responding to Senator Lieberman's July 2, 2003 Letter to the Secretary of the Interior.

<sup>4</sup> “An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes” (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

(BLM) lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims.<sup>5</sup> After the Department issued a proposed rule in 1994 to establish a formal process for evaluating R.S. 2477 claims, Congress responded by enacting temporary moratoria and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The permanent prohibition, set forth in Section 108, states that:

“No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”<sup>6</sup>

Mindful of this Section 108 restriction, DOI took two major actions in 2003 relating to R.S. 2477 rights-of-way that have generated considerable attention in Congress and elsewhere and are the focus of your request.<sup>7</sup> First, the Department issued the 2003 Disclaimer Rule on January 6, 2003, amending the Department’s existing regulations, promulgated in 1984, implementing FLPMA § 315. FLPMA § 315 authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances. As pertinent here, § 315 provides that:

“After consulting with any affected Federal agency, the [Department] is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where [the Department] determines [that] a record interest of the United States in lands has terminated by operation of law or is otherwise invalid . . .”

FLPMA § 315(a), 43 U.S.C. § 1745(a). DOI’s FLPMA § 315 regulations establish a disclaimer application process, *see* 43 C.F.R. subpart 1864, and in the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this process to validate R.S. 2477 rights-of-way, although it stated that FLPMA § 315 has always provided such authority. The Department also stated in the January 2003 preamble that because the 2003 Disclaimer Rule did not contain “specific standards” for evaluating asserted R.S. 2477 rights-of-way, it did not “pertain” to their recognition, management, or validity and thus did not run afoul of Section 108. *See* 68 Fed. Reg. at 496-97.

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<sup>5</sup> U.S. Dep’t of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-of-Way Claims on Federal and Other Lands* (June 1993) at 29.

<sup>6</sup> Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). We have previously determined that Section 108 is permanent law. *See* B-277719, Aug. 20, 1997.

<sup>7</sup> In addition to your request for our legal opinion and your correspondence to the Secretary, at least 88 members of the House of Representatives, as well as Senator Lieberman, have written to the Secretary in 2003 expressing concern about these actions.

The Department's second major R.S. 2477-related action in 2003 was issuance of the Utah MOU on April 9, 2003. The Utah MOU states that DOI will implement a "State and County Road Acknowledgment Process" to "acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah," and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. *See* Utah MOU at 2-3. The State of Utah or any Utah county may request initiation of this acknowledgment/disclaimer process for "eligible roads"; such roads must meet specified criteria including "meet[ing] the legal requirements of a right-of-way granted under R.S. 2477." *Id.* at 3. On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way.

### SUMMARY OF CONCLUSIONS

As detailed in the enclosed opinion, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude that FLPMA § 315 otherwise authorizes the Department to disclaim United States' interests in R.S. 2477 rights-of-way.

With respect to the first issue, although the 2003 Disclaimer Rule itself is clearly a "final rule or regulation," we do not believe it is a final rule or regulation "pertaining to the recognition, management, or validity" of R.S. 2477 rights-of-way subject to Section 108. Because the terms of the 2003 Disclaimer Rule (as well as the original 1984 regulations) are silent on R.S. 2477 rights-of-way, we do not believe the Rule pertains to R.S. 2477 rights-of-way as contemplated by Section 108. The preamble to the 2003 Disclaimer Rule does discuss recognition and validity of R.S. 2477 rights-of-way, but the preamble does not qualify as a substantive rule under the Administrative Procedure Act (APA), which we believe was Congress' intention in using the term "final rule or regulation" in Section 108. Moreover, because the 2003 Disclaimer Rule preamble does not prescribe procedural or substantive standards by which R.S. 2477 rights-of-way will be evaluated, it does not "pertain" to R.S. 2477 rights-of-way within the meaning of Section 108.

On the other hand, we conclude that the Utah MOU is a final rule or regulation subject to Section 108's prohibition. There is little question that the MOU pertains to the "recognition, management, or validity" of R.S. 2477 rights-of-way; the purpose of the MOU was to resolve years of conflict over these precise issues. We also believe the MOU is an APA substantive rule and thus a "final rule or regulation" under Section 108. It both satisfies the APA's definition of "rule"—"an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," *see* 5 U.S.C. § 551(4)—and meets the key test by which courts have defined substantive rules—it has a binding effect on the agency and other parties and represents a change in law and policy.

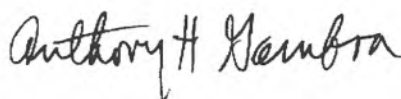
Apart from Section 108's prohibition, on balance, we conclude that FLPMA § 315 authorizes DOI to disclaim interests in R.S. 2477 rights-of-way. This interpretation of FLPMA § 315 represents a novel application of the statute by the Department, but one

which, under applicable principles of statutory construction and administrative law, is entitled to substantial deference. A number of the key terms in FLPMA § 315 are ambiguous—notably, “lands,” “interests in lands,” and “cloud on title”—and in such instances, we afford considerable weight to the interpretation of the agency charged with implementing the statutes so long as the interpretation is reasonable. We find the Department’s interpretations of these terms to be reasonable. The Department reads “lands” to include a partial interest in lands, consistent with its longstanding definition of that term in its FLPMA § 315 disclaimer regulations. Under this interpretation, a particular R.S. 2477 right-of-way—which is an “interest in lands”—suffers a “cloud on title” when there is uncertainty about whether the right-of-way has in fact been established, or whether instead the United States has retained its right to exclusive use of the surface property at issue. The remaining requirement of FLPMA § 315—that a “record interest of the United States in lands has terminated by operation of law”—also is satisfied. When an easement such as an R.S. 2477 right-of-way is granted, it creates two separate property interests: a servient estate (here, owned by the United States) and a dominant estate (here, owned by the holder of the R.S. 2477 right-of-way). At the same time, a record interest of the United States terminates because its interest in exclusive use of the land over which the right-of-way now runs terminates. We recognize that this interpretation of FLPMA § 315 by DOI is a novel one and it is not the only reasonable interpretation. However, under established principles of statutory construction and firmly embedded in administrative law, courts give substantial deference to an implementing agency’s interpretation if it is one of several reasonable interpretations, and thus we do so here in opining on how courts would address these issues.

In sum, we conclude that the Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We conclude further that FLPMA § 315 otherwise authorizes the Department to disclaim the United States’ interests in R.S. 2477 rights-of-way.

Please contact Susan D. Sawtelle, Associate General Counsel, at (202) 512-6417, Karen Keegan, Assistant General Counsel, at (202) 512-8240, or Amy Webbink, Senior Attorney, at (202) 512-4764, if there are questions concerning this opinion.

Sincerely yours,



Anthony H. Gamboa  
General Counsel

Enclosure



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ENCLOSURE

B-300912

RECOGNITION OF R.S. 2477 RIGHTS-OF-WAY UNDER THE  
DEPARTMENT OF THE INTERIOR'S FLPMA DISCLAIMER RULES AND ITS  
MEMORANDUM OF UNDERSTANDING WITH THE STATE OF UTAH

In 2003, the Department of the Interior (the Department or DOI) took two major actions relating to so-called R.S. 2477 rights-of-way that have generated considerable attention and are the subject of this opinion. First, on January 6, 2003, the Department issued revisions to its existing regulations, originally promulgated in 1984, implementing section 315 of the Federal Land Policy and Management Act (FLPMA) (2003 Disclaimer Rule). FLPMA § 315, 43 U.S.C. § 1745, authorizes the Department to issue recordable disclaimers of U.S. interests in lands in certain circumstances, and DOI's FLPMA § 315 regulations establish a process by which to apply for such disclaimers. In the preamble to the 2003 Disclaimer Rule, DOI formally announced for the first time that it might use this FLPMA disclaimer process to evaluate the validity of rights-of-way across public lands for the construction of highways, granted by an 1866 mining law now known as Revised Statute 2477 (R.S. 2477). Although R.S. 2477 was repealed by FLPMA in 1976, Congress expressly preserved rights-of-way that already had been established. The self-executing nature of these rights-of-way has led to considerable uncertainty about whether particular rights-of-way have in fact been established, and DOI's 2003 preamble statement announced a new approach to resolving this uncertainty—the use of FLPMA § 315.

Second, following on to this preamble announcement, on April 9, 2003, the Department signed a Memorandum of Understanding with the State of Utah (Utah MOU). The Utah MOU states that DOI will implement a "State and County Road Acknowledgment Process" to "acknowledge the existence of certain R.S. 2477 rights-of-way on Bureau of Land Management [BLM] land within the State of Utah," and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. Under the Utah MOU, the State or any Utah county may request initiation of this acknowledgment/disclaimer process for "eligible roads"; such roads must meet certain standards including "meet[ing] the legal requirements of a right-of-way granted under R.S. 2477." On January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest for specific R.S. 2477 rights-of-way.

Two principal legal concerns have been raised with respect to these recent actions by the Department. The first is whether either the 2003 Disclaimer Rule or the Utah MOU violates a statutory prohibition contained in section 108 of the Department of the Interior and Related Agencies Appropriations Act, 1997 (Section 108). Section

108 prohibits any final rule or regulation “pertaining to the recognition, management, or validity” of R.S. 2477 rights-of-way from taking effect without express congressional authorization, and the question is whether the 2003 Disclaimer Rule or the Utah MOU constitutes a final rule or regulation covered by Section 108. The second legal concern is whether, apart from this Section 108 prohibition, the Department may use the authority of FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

These concerns raise a number of legal issues as to which no court has ruled to date and as to which there are a range of colorable arguments. As discussed below, we conclude that the 2003 Utah MOU, but not the 2003 Disclaimer Rule, is a final rule or regulation prohibited from taking effect by Section 108. We further conclude, based on applicable rules of statutory construction and administrative law, that on balance, FLPMA § 315 otherwise authorizes the Department to disclaim United States’ interests in R.S. 2477 rights-of-way.

#### FACTUAL AND LEGAL BACKGROUND

In order to promote settlement of the American West in the 1800s and provide access to mining deposits located under federal lands, Congress granted rights-of-way across public lands for the construction of highways by a provision of the Mining Law of 1866, now known as R.S. 2477.<sup>1</sup> In 1976, Congress enacted FLPMA, which reflected a shift from Congress’ historic approach of encouraging disposition and settlement of federal public domain lands to an approach favoring retention and management of public lands. As part of this new approach, FLPMA repealed R.S. 2477, along with other federal statutory rights-of-way, but R.S. 2477 rights-of-way that already had been established were expressly preserved. *See* 43 U.S.C. §§ 1701 note, 1769(a). In its entirety, R.S. 2477 provided that:

the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

In the words of one court, R.S. 2477 made “an open-ended and self-executing grant.” *Sierra Club v. Hodel*, 848 F.2d 1068, 1078 (10th Cir. 1988). R.S. 2477 did not require government approval, issuance of an identifying record such as a land patent, or public recording of title. A state or county needed only to satisfy the requirements set forth in R.S. 2477—namely, to engage in some form of “construction” of a “highway” over non-reserved public lands—in order to establish a valid R.S. 2477 right-of-way. *See Southern Utah Wilderness Alliance v. BLM*, 147 F. Supp. 2d 1130, 1140 (D. Utah 2001), *appeal dismissed*, 2003 WL 21480689 (10th Cir. 2003).

As a result of this lack of formal approval and public documentation, uncertainty arose regarding whether particular R.S. 2477 rights-of-way had in fact been established. In an effort to resolve some of this uncertainty, the Department has issued a series of policy and other documents over the years, discussing methods of

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<sup>1</sup> “An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes” (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

administratively recognizing or validating R.S. 2477 rights-of-way. In 1988, for example, DOI Secretary Hodel issued the so-called Hodel Policy, stating that although R.S. 2477 did not authorize the Department to “adjudicate” applications for R.S. 2477 rights-of-way, it could “administratively recogniz[e]” and record them on DOI land records.<sup>2</sup> The Hodel Policy directed DOI land management bureaus to develop internal procedures for issuing such administrative recognitions and laid out the criteria by which recognitions should be made. In a 1993 report to Congress on R.S. 2477 issues, DOI stated that its R.S. 2477 administrative decisions were intended to facilitate practical resolutions of R.S. 2477 disputes but were not legally binding. As the Department explained:

“Administrative recognitions [of R.S. 2477 rights-of-way under the Hodel Policy] are not intended to be binding, or a final agency action. Rather, they are recognitions of ‘claims’ and are useful only for limited purposes. Courts must ultimately determine the validity of such claims . . . An administrative determination is an agency recognition that an R.S. 2477 right-of-way probably exists. The process used to make an administrative determination has been developed in response to claims filed and provides an administrative alternative to litigating each and every potential right-of-way. [It] is not intended to be binding or final agency action, but simply a ‘recognition’ of ‘claims’ for land-use planning purposes.”

U.S. Dep’t of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-of-Way Claims on Federal and Other Lands* (June 1993) (*DOI Report to Congress*) at 25-26. According to the Department, as of 1993, DOI and the courts together had recognized about 1,453 R.S. 2477 rights-of-way across BLM lands, with about 5,600 claims remaining, primarily in Utah, and an unknown number of unasserted potential claims. *Id.* at 29.

The following year, in 1994, the Department attempted to create a more formal administrative process for adjudicating R.S. 2477 claims. It proposed a regulatory process that it said would result in “binding determinations of [the] existence and validity” of R.S. 2477 rights-of-way. *See* “Revised Statute 2477 Rights-of-Way,” 59 Fed. Reg. 39216, 39216 (Aug. 1, 1994). Congress was concerned with this regulatory proposal, however, as it had been with some of the Department’s earlier approaches to validating R.S. 2477 rights-of-way, and responded by enacting temporary moratoria<sup>3</sup> and, in 1996, a permanent prohibition on certain R.S. 2477-related activity. The 1996 prohibition provided that:

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<sup>2</sup> Memorandum from the Acting Assistant Secretary for Fish and Wildlife and Parks and the Assistant Secretary for Land and Minerals Management to the Secretary of the Interior, approved by Secretary Hodel, “Departmental Policy on Section 8 of the Act of July 26, 1866, Revised Statute 2477 (Repealed), Grant of Right-of-Way for Public Highways (RS2477)” (Dec. 9, 1988).

<sup>3</sup> *See* National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 349(a)(1)-(2), 109 Stat. 568 (1995); Department of the Interior and Related Agencies Appropriations Act, 1996, § 110, as enacted by the Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

“No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477] shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”

Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996) (Section 108).<sup>4</sup>

In response to the Section 108 prohibition, DOI Secretary Babbitt issued the so-called Babbitt Policy in 1997.<sup>5</sup> The Babbitt Policy, revoking the Hodel Policy, states that until any R.S. 2477 rules become effective, and as an alternative to litigation in federal court, the Department will continue to “process” and “give its views” on “assertions” of R.S. 2477 rights-of-way, but only in cases where there is a “demonstrated, compelling, and immediate need” to do so. In such cases, DOI will issue “determinations” that “recognize” those rights-of-way meeting the R.S. 2477 statutory criteria.<sup>6</sup>

Finally, in 2003 and still mindful of the restrictions of Section 108, DOI took the two actions that are the focus of this opinion. First, as noted above, it issued the 2003 Disclaimer Rule on January 6, 2003, revising its existing regulatory process for issuance of recordable disclaimers of U.S. interests in lands under FLPMA § 315. *See* “Conveyances, Disclaimers and Correction Documents,” 68 Fed. Reg. 494 (Jan. 6, 2003), amending 43 C.F.R. subpart 1864. As pertinent here, FLPMA § 315 provides that:

“After consulting with any affected Federal agency, the [Department] is authorized to issue a document of disclaimer of interest or interests in

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<sup>4</sup> We have previously determined that the prohibitions of Section 108 are permanent. *See* B-277719, Aug. 20, 1997. The Department recently suggested that Section 108 might have expired at the end of fiscal year 1997, *see, e.g.*, “Conveyances, Disclaimers and Correction Documents,” 68 Fed. Reg. 494, 496 (Jan. 6, 2003), but it has previously acknowledged that Section 108 is, in fact, permanent legislation. *See* “Wilderness Management,” 65 Fed. Reg. 78358, 78370 (Dec. 14, 2000) (“BLM is forestalled by a 1997 statute from promulgating regulations on R.S. 2477 rights-of-way without Congressional consent.”). Although language in annual appropriations acts generally applies only during the fiscal year to which the statute pertains, appropriations act provisions are considered permanent if the statutory language or the nature of the provision makes it clear that Congress intended the provision to be permanent. One clear indicator of permanency is use of so-called “words of futurity,” such as “hereafter” or, as in Section 108, “subsequent to the date of enactment.” *See, e.g., United States v. Vulte*, 233 U.S. 509, 512 (1914); *Norcross v. United States*, 142 Ct. Cl. 767, 768 (1958); 70 Comp. Gen. 351, 353 (1991). The permanency of Section 108 also is demonstrated by the fact that it is a substantive provision, rather than merely a restriction on the use of appropriations. *See, e.g., United States v. Vulte*, above, 233 U.S. at 513; *Cella v. United States*, 208 F.2d 778 (7th Cir. 1953).

<sup>5</sup> Memorandum from the Secretary of the Interior to the Assistant Secretaries for Fish and Wildlife and Parks, Land and Minerals Management, and Water and Science, “Interim Departmental Policy on Revised Statute 2477 Right-of-Way for Public Highways; Revocation of December 7, 1988 Policy” (Jan. 22, 1997).

<sup>6</sup> Babbitt Policy at 1-2. DOI had previously articulated these fundamental aspects of the Babbitt Policy in 1993. *See DOI Report to Congress*, above, at 5 and App. II, Ex. A.

any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where [the Department] determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid; or (2) the lands lying between the meander line shown on a plat of survey approved by [BLM] or its predecessors and the actual shoreline of a body of water are not lands of the United States; or (3) accreted, relicted, or avulsed lands are not lands of the United States.”

FLPMA § 315(a), 43 U.S.C. § 1745(a). The 2003 Disclaimer Rule expanded the circumstances under which disclaimer applications could be filed. As amended, the regulations now: (a) allow state and local governments to apply for a disclaimer at any time, removing the deadline applicable to other entities (who must file within 12 years of the time they knew or should have known of a possible U.S. claim); (b) allow “any entity claiming title to lands,” not just current owners of record, to apply for a disclaimer; and (c) provide that disclaimers will not be issued if a federal land management agency other than BLM with jurisdiction over the affected lands makes a “valid objection” to issuance of the disclaimer. *See* 68 Fed. Reg. at 502-03.

In addition to issuing the revisions themselves, DOI formally announced for the first time, in the preamble to the 2003 Disclaimer Rule, that the agency might use the FLPMA § 315 disclaimer process to validate R.S. 2477 rights-of-way. According to DOI, FLPMA § 315 and the agency’s 1984 implementing regulations had always authorized this approach:

“Recordable disclaimers may be issued [under FLPMA § 315] where applicants assert title previously created under now expired authorities. For example, after adjudicating [an R.S. 2477] claim, BLM may issue a recordable disclaimer of interest to disclaim the United States’ interest in a highway right-of-way under R.S. 2477 . . . BLM may issue recordable disclaimers relating to valid R.S. 2477 rights-of-way under the existing 1984 regulations, and this capability will continue under today’s rule.”

68 Fed. Reg. at 496-97. The Department also stated in the preamble that because the 2003 Disclaimer Rule did not contain “specific standards” for evaluating asserted R.S. 2477 rights-of-way, it did not “pertain” to their recognition, management, or validity and so did not run afoul of the restrictions of Section 108. *Id.* at 497.

The Department identified such “specific standards” for recognizing R.S. 2477 rights-of-way three months later when it signed the Utah MOU, its second major R.S. 2477-related action of 2003. *See* Memorandum of Understanding Between the State of Utah and the Department of the Interior on State and County Road Acknowledgment (Apr. 9, 2003). As noted above, the Utah MOU states that DOI will implement a “State and County Road Acknowledgment Process” to “acknowledge the existence of certain R.S. 2477 rights-of-way on [BLM] land within the State of Utah,” and the process DOI will use to make these acknowledgments is the FLPMA § 315 disclaimer process. Utah MOU at 2-3. The State or any Utah county may request initiation of this process—for which it must reimburse BLM its processing costs—with regard to “eligible roads,” the standards for which include the following:

- The road must have existed prior to enactment of FLPMA in 1976 and be in current use;
- The road must be identifiable by centerline description or other appropriate legal description;
- The existence of the road prior to FLPMA must be sufficiently documented to show that the road meets the legal requirements of an R.S. 2477 right-of-way; and
- The road was and must continue to be public and capable of accommodating four-wheel cars or trucks and must have been subject to some type of periodic maintenance.

*Id.* at 3. The Utah MOU also provides that the State and Utah counties will not assert rights-of-way under the MOU for roads within the National Park System, the National Wildlife Refuge System, or designated Wilderness Areas or Wilderness Study Areas designated before October 1993, or lands administered by agencies other than DOI except by their consent. *Id.* at 2-3. In order to “facilitate” the Utah MOU Acknowledgment Process, the MOU provides that the 1997 Babbitt Policy’s requirements for R.S. 2477 determinations will not apply to such requests but will continue to apply to all other requests for R.S. 2477 recognitions. *Id.* at 4.

In June 2003, the Department issued additional guidance (Utah MOU Guidance) regarding how applications will be processed under the Utah MOU.<sup>7</sup> Reflecting DOI’s FLPMA § 315 disclaimer application regulations, the Utah MOU Guidance explains that: (1) applicants must pay BLM’s administrative costs of processing applications (*see* 43 C.F.R. §§ 1864.1-2 and -3); (2) at least 90 days before BLM makes a decision on an application, it will publish a notice in the *Federal Register* summarizing the application and noting an opportunity for public comment (*see* 43 C.F.R. § 1864.2); and (3) adverse decisions can be appealed by the applicant or any adverse claimant (*see* 43 C.F.R. § 1864.4).

During the summer of 2003, various riders were proposed to the House Department of Interior Appropriations bill for FY 2004 that would have prohibited DOI from using appropriated funds to implement the 2003 Disclaimer Rule under certain circumstances. None of these riders was enacted.

Finally, on January 14, 2004, the Governor of Utah submitted the first application under the Utah MOU for acknowledgment and a recordable disclaimer of interest of specific R.S. 2477 rights-of-way. As of the date of this opinion, BLM has not yet published a *Federal Register* notice regarding this application.

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<sup>7</sup> Memorandum from the BLM Deputy Director to the BLM State Director for Utah, “Processing Applications for Recordable Disclaimers of Interest-Acknowledgment of R.S. 2477 Rights-of-Way Pursuant to the Memorandum of Understanding (MOU) of April 9, 2003” (June 25, 2003).

## ANALYSIS

### I. Applicability of the Section 108 Prohibition to the 2003 Disclaimer Rule and the Utah MOU

#### A. Applicability of Section 108 to the 2003 Disclaimer Rule

As discussed above, Section 108 prohibits any “final rule or regulation . . . pertaining to the recognition, management, or validity of a right-of-way pursuant to [R.S. 2477]” from taking effect unless expressly authorized by an Act of Congress, but does not define the phrase “final rule or regulation.” For the reasons discussed below, we believe Congress intended Section 108 to apply only to substantive rules under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, the statute generally governing agency rulemaking and adjudications.

The APA defines a “rule” as:

“the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .”

5 U.S.C. § 551(4). There are different types of APA rules, the principal distinction being “between ‘substantive rules’ on the one hand and ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice’ on the other.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979). Substantive rules, also called legislative rules, affect individual rights and obligations and must be published for notice and comment under 5 U.S.C. § 553(b). They are the only rules that can have a “binding effect” or the “force and effect of law.” *Chrysler Corp.*, 441 U.S. at 315. As the D.C. Circuit Court of Appeals explained in *Troy Corp v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997)(citation omitted), “[a] legislative rule . . . is one that: (1) ‘supplements’ a statute; (2) ‘effect[s] a change in existing law or policy’; or (3) ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.’” By contrast, interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are not subject to notice and comment requirements and lack enforceable legal effect. *See, e.g., Davidson v. Glickman*, 169 F.3d 996, 998 (5th Cir. 1999) (“Interpretive rules state what the administrative officer thinks the statute or regulation means while legislative rules affect individual rights and obligations and create law.”) (internal quotation and citation omitted).<sup>8</sup>

We believe that by using the language “final rule or regulation,” Congress intended the restrictions of Section 108 to apply only to APA substantive rules. First, Section

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<sup>8</sup> *See also Syncor v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997) (only legislative rules can create law that binds the agency, courts, and third parties); *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“A properly adopted substantive rule establishes a standard of conduct which has the force of law . . . a general statement of policy, on the other hand, does not establish a ‘binding norm.’”).

108 refers to no final rule or regulation “tak[ing] effect” and only substantive rules have a “binding effect” and the “force and effect of law.” Similarly, the legislative history of Section 108 indicates that Congress intended to bar only the implementation of final, substantive regulations, not, as did the earlier temporary moratoria, agency activity preliminary to implementation of final rules.<sup>9</sup> Finally, Congress and courts often equate the terms “final rule” and “regulation” with an agency rule subject to notice and comment, that is, an APA substantive rule. *See, e.g.*, 5 U.S.C. § 604 (“When an agency promulgates a final rule under section 553 of [Title 5, U.S.C.], after being required by that section or any other law to publish a general notice of proposed rulemaking . . . the agency shall prepare a final regulatory flexibility analysis.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127, 145 (2000) (referring to FDA and FTC substantive rules as FDA and FTC “final rules”).<sup>10</sup>

Consistent with the above, in determining whether particular agency statements constitute APA substantive rules, courts have focused on three basic factors: (1) how the agency characterizes its own statement; (2) whether the statement was published for notice and comment; and (3) whether the statement binds private parties or the agency. *See, e.g., Molycorp Inc. v. EPA*, 197 F.3d 543 (D.C. Cir. 1999). Of these factors, the third—a statement’s binding effect—is the most critical. As the D.C. Circuit Court of Appeals explained in *Molycorp*, “[t]he first two criteria serve to illuminate the third, for the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, *i.e.*, that it has the force of law.” 197 F.3d at 545. *See also Ctr. for Auto Safety v. NHTSA*, 710 F.2d 842, 846 (D.C. Cir. 1983) (“The mere fact that NHTSA did not denominate its withdrawal of the January Notice a ‘rule’ is not determinative of whether it did, in fact, issue a rule within the meaning of the statute. It is the substance of what the agency has purported to do and has done which is decisive.”) (internal quotations and citations omitted).

Applying these three factors, the 2003 Disclaimer Rule is clearly a substantive APA rule and thus potentially—if it pertains to the recognition, management, or validity of a R.S. 2477 right-of-way—subject to Section 108. First, the Department itself has characterized the 2003 Disclaimer Rule as a “final rule” in publishing it in the *Federal Register*. *See* 68 Fed. Reg. at 494; *see also* Letter from DOI Associate Solicitor, Division of Land and Water Resources, to GAO Associate General Counsel (Jul. 15, 2003) (DOI Response to GAO) at 4 (referring to 2003 Disclaimer Rule as a “rule” and “final rule”). Second, the 2003 Disclaimer Rule is clearly a rule promulgated under APA notice and comment procedures. Third and most critically, it has a binding effect and the force of law. As the preamble to the 2003 Disclaimer Rule states at the

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<sup>9</sup> *See, e.g.*, S. Rep. No. 104-261 (1996) at 1-2 (“Resolution of R.S. 2477 right-of-way claims has been a very complex and contentious process” and the provision that ultimately became Section 108 “will allow the Department to proceed with the development of new regulations, while prohibiting their implementation until expressly approved by an Act of Congress.”).

<sup>10</sup> *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 682-83 (1987) (equating final rules and regulations with substantive rules promulgated after notice and comment); *Franklin Assoc. Fisheries of Maine*, 989 F.2d 54, 59 (1st Cir. 1993) (same); *Alabama Tissue Ctr. v. Sullivan*, 975 F.2d 373, 377 (7th Cir. 1992) (same); *NRDC v. EPA*, 683 F.2d 752 (3d Cir. 1982) (same).

outset, "This rule is effective February 5, 2003. Any application for a recordable disclaimer pending on the effective date of this final rule will be subject to this final rule." 68 Fed. Reg. at 495. The 2003 Disclaimer Rule also, under *Troy Corp. v. Browner*, above, "effect[s] a change in existing law or policy' . . . and 'grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.'" As noted above, it expanded both the entities that may apply for a FLPMA § 315 disclaimer and the time period in which they may do so.

The remaining issue concerning the applicability of Section 108 to the 2003 Disclaimer Rule is whether it "pertain[s] to the recognition, management, or validity" of R.S. 2477 rights-of-way. In our view, it does not. Nothing in language of the Disclaimer Rule itself discusses or refers in any way to R.S. 2477 rights-of-way. This is consistent with the fact, emphasized by the Department, that the disclaimer regulations are not designed to deal just with R.S. 2477 recognitions but instead are a "catch-all" provision of [FLPMA] that allows the BLM to 'help remove a cloud on the title' to Federal land . . ." <sup>11</sup> The only mention of R.S. 2477 is in the preamble to the Rule, where DOI discusses how it may use the FLPMA § 315 disclaimer process as a means of recognizing R.S. 2477 rights-of-way. We do not believe the preamble is a Section 108 "final rule or regulation," however. Preambles generally are treated as non-binding agency policy statements, not as substantive rules as required by Section 108, <sup>12</sup> and there is nothing in the 2003 Disclaimer Rule preamble indicating the Department intends to be bound by its pronouncements regarding R.S. 2477. At most, therefore, the preamble might be deemed to be an interpretive rule, <sup>13</sup> which would not fall within Section 108. Moreover, we do not believe the preamble pertains to the recognition, validity, or management of R.S. 2477 rights-of-way in the manner contemplated by Section 108. The plain language and legislative history of Section 108 indicate that it was intended to prevent the Department from creating and applying substantive standards for validating the existence of R.S. 2477 rights-of-way or prescribing how they should be managed, because Congress itself wanted to define the key standards and scope of R.S. 2477 grants or at least maintain the status quo. <sup>14</sup>

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<sup>11</sup> Letter from Assistant Secretary of the Interior for Land and Minerals Management to the Honorable Jeff Bingaman (June 19, 2003) (DOI Response to Sen. Bingaman) at 1.

<sup>12</sup> See, e.g., *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1208 (D.C. Cir. 1998) ("It is doubtful that the preamble alone is definite and specific enough to be a binding statement of agency policy. For one thing, the statements concerning the permit shield were not published in the Code of Federal Regulations. For another, EPA has claimed that its statements were no more than "an interpretation" . . . and [the petitioner] has presented no evidence that the preamble has a direct and immediate effect on it.") (internal citations omitted); *City of Seabrook, Tex. v. EPA*, 659 F.2d 1349, 1365 (5th Cir. 1981) (two preamble statements referred to as "policy statements . . . not rules adopted in accordance with administrative rulemaking procedure; they are merely 'interpretive rules' or 'general statements of policy.'").

<sup>13</sup> See, e.g., *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87 (1995) (agency manual advising how Medicare statutes and regulations would be applied to particular reimbursement claims was interpretive, not substantive, rule).

<sup>14</sup> See, e.g., *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1236-37 (citing S. Rep. No. 104-261 (1996) at 2, court states that "Congress was concerned with rule-making concerning the process for deciding the validity of R.S. § 2477 claims"); 141 Cong. Rec. S17530-08 (1995) (statement of Sen. Hatch) (discussing DOI's 1994 proposed R.S. 2477 rule, court states that "[t]he Secretary's regulations are evidence that the task of achieving a solution that protects the intent and scope of the original statute

Nothing in the preamble identifies any such standards. In sum, we conclude that neither the 2003 Disclaimer Rule itself nor its preamble is a final rule or regulation subject to the restrictions of Section 108.

## B. Applicability of Section 108 to the Utah MOU

We reach a different conclusion regarding the applicability of Section 108 to the Utah MOU. In contrast to our conclusion regarding the 2003 Disclaimer Rule, we believe Section 108 applies to the Utah MOU. As a threshold matter, there can be little doubt that the Utah MOU “pertains” to the “recognition, management, or validity” of R.S. 2477 rights-of-way. The purpose of the MOU was to address years of “unresolved conflicts” over these precise issues, which DOI had “traditionally approached . . . by trying to define the precise legal limits of the original [R.S. 2477] statutory grant,” *see* Utah MOU at 1, and as discussed below, the MOU includes substantive provisions pertaining to all three issues. The remaining question is whether the Utah MOU is a “final rule or regulation,” meaning, as discussed above, that it is both an APA rule and a substantive rule. We conclude that it is both.

### 1. The Utah MOU as an APA Rule

The Utah MOU meets the definition of an APA rule, that is, “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). Although the Utah MOU does not apply to all R.S. 2477 claimants in the United States, it applies to all claimants for certain locations in Utah; agency MOUs or other statements applicable to just one or a handful of entities, or just one individual, have been held to be APA rules of either “general or particular applicability.”<sup>16</sup> In addition, courts sometimes look to whether the agency statement will also affect entities indirectly as well as directly, in determining the scope of its “applicability.” In *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978), for example, the court noted that “even when only one manufacturer is subject to the standards, that manufacturer is not the only affected entity. The standards affect the multitude who fish, take drinking water, or otherwise, directly or indirectly, come in contact with waters containing the discharged toxic substance, all of whom may appear in proceedings. . . . Rulemaking, not adjudication, is the appropriate, flexible procedural mechanism to accommodate the input of all concerned.” Likewise, the Utah MOU will affect not only the Utah governmental

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while preserving the infrastructure of rural communities must involve Congress. . . [W]e are beyond a regulatory fix on this subject”).

<sup>16</sup> For example, in *West Virginia Mining and Reclamation Ass'n v. Snyder*, 1991 WL 331482 (N.D. W. Va. 1991), involving DOI's Office of Surface Mining Reclamation and Enforcement (OSM), the court held that an MOU between OSM and the West Virginia Division of Energy was an APA rule where it established a policy under which OSM would “provide[] financial and technical assistance to West Virginia in exchange for direct involvement in regulation of the [Surface Mining Control and Reclamation Act].” *See also Mitchell Energy & Devt. Corp. v. Fain*, 311 F.3d 685 (5th Cir. 2002) (statement by Secretary of Labor was APA rule of “particular applicability” where it applied to certified states and implemented “methods of administration” required by the Social Security Act for the federal/state unemployment compensation system); *City of Alexandria v. Helms*, 728 F.2d 643 (4th Cir. 1984) (FAA order to implement scatter plan test at National Airport was APA rule of particular applicability designed to implement agency policy).

entities applying for R.S. 2477 acknowledgments/disclaimers, but also persons using the asserted rights-of-way, those who disfavor continued use, and those owning the underlying land where the federal government is no longer the owner. The Utah MOU thus is an “agency statement of general or particular applicability.”

The Utah MOU also is an agency statement of “future effect.” Courts have applied this requirement to mean statements having future legal consequences,<sup>16</sup> and the Utah MOU meets this test. It addresses how DOI will evaluate R.S. 2477 claims in the future, not rights-of-way that already have been recognized. Finally, the Utah MOU is “designed to implement, interpret, or prescribe law or policy.” It prescribes and implements the law and policy by which Utah government entities will seek recognition of their asserted R.S. 2477 rights-of-way. *See, e.g., Lefevre v. Secretary, Dep’t of Veterans Affairs*, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) (“The determination was a rule because . . . it prescribed the basis on which the Department would adjudicate every claim seeking disability or survivor benefits for specified diseases allegedly caused by exposure to herbicides in Vietnam.”); *Hercules Inc.*, above, 598 F.2d at 117 (“The standards are designed to ‘implement’ and ‘prescribe law’ pursuant to the authority of the 1972 Act.”).

The Department states that the Utah MOU is not a rule issued in violation of Section 108 but rather a voluntary agreement with the State of Utah.<sup>17</sup> The courts have rejected such arguments. Simply because an agency statement sets standards for participation in a “voluntary” program does not mean the standards are not “rules.” As the D.C. Circuit held in *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 96 n.6 (D.C. Cir. 2002), “[t]he government’s suggestion that because participation in the program is ‘voluntary’ the announcement and accompanying documents should not be considered a rule is not worth a response.” Similarly, in *Mitchell Energy & Devt. Corp. v. Fain*, 311 F.3d 685 (5th Cir. 2002), the Fifth Circuit held that a Labor Department statement establishing required methods of administration for a federal/state unemployment compensation system was a rule, even though states had the option of not participating in the system. Under the theory that standards for activities voluntarily entered into are not rules, the court observed, “many things in the Code of Federal Regulations [would not be] rules because the underlying conduct, from operating a nuclear reactor to listing on the New York Stock Exchange, is voluntary.” *Id.* at 688.

The Department also asserts that Section 108 is not implicated by its recent actions because R.S. 2477 recognition decisions will result from an informal agency adjudication, not a rulemaking.<sup>18</sup> This may be correct but is beside the point. The

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<sup>16</sup> *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (“The only plausible reading of [“future effect”] is that rules have legal consequences only for the future.”); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 166 (D.C. Cir. 2002) (FCC local ownership rule dealt with the “future effect, not the past legal consequences of [local marketing agreements]”).

<sup>17</sup> *See* DOI Response to GAO, above, at 6 (“The Utah MOU is not a rule. It was developed to avoid litigation threatened by Utah and its counties. It is an agreement concerning how Utah will present its applications for recordable disclaimers for R.S. 2477 rights-of-way for BLM’s consideration.”).

<sup>18</sup> DOI Response to Sen. Bingaman, above, at 4; *see also* 68 Fed. Reg. at 497 (“Even if BLM were to issue a disclaimer of the United States’ interest in a valid right-of-way under R.S. 2477, the recognition of

subject of Congress' concern in Section 108 was DOI's establishment of the overall standards for recognizing, managing, and validating R.S. 2477 rights-of-way, not its decision in a particular case—in other words, it was concerned about the “rules of the game,” not a particular game score. The Fifth Circuit rejected a similar argument by the Department in *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001). The court in *Babbitt* found that although DOI had issued a decision in a particular adjudication, the decision was governed by a policy change that was a substantive rule. Similarly, in *Hercules Inc. v. EPA*, 598 F.2d 91, 118 (D.C. Cir. 1978), the D.C. Circuit found that certain EPA water pollution standards were rules, not orders, because the “inquiries are the same whether the [toxic] substance is discharged by one manufacturer or one thousand”; the determinations are “categorical, not individual or local. . .” Here, the Utah MOU sets uniform rules for how all R.S. 2477 claims to which the MOU applies will be decided. As the D.C. Circuit has noted, “rule making is not transformed into adjudication merely because the rule adopted may be determinative of specific situations arising in the future.” *Logansport Broad. Corp. v. United States*, 210 F.2d 24, 27 (D.C. Cir. 1954).<sup>19</sup> In sum, the Utah MOU is an APA rule.

## 2. The Utah MOU as a Substantive Rule

We also find that the Utah MOU is a substantive rule. The Utah MOU does not meet two of the factors discussed above that courts apply in determining whether a rule is a substantive rule—characterization as such by the agency and publication for notice and comment in the *Federal Register*. According to DOI, the Utah MOU is not a rule but rather a cooperative agreement under FLPMA § 307(b).<sup>20</sup> Nor was the Utah MOU published for notice and comment. Nevertheless, as noted above, courts look beyond these first two factors to focus on the third: whether the agency statement has a binding effect and the “force and effect of law.” In our view, there is little question that the Utah MOU has such an effect.

First, DOI itself acknowledges that “the Utah MOU . . . is binding . . . on the parties to the MOU, namely the Department and the State of Utah.” DOI Response to GAO at 4. The fact that the Utah MOU incorporates the FLPMA § 315 disclaimer regulations by reference—which, as DOI also acknowledges, are also “are binding on both the BLM and the applicant”—underscores the binding nature of the Utah MOU. *Id.* Although the Utah MOU contains a standard clause asserting that it does not create a private

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such right-of-way would not be the result of this notice-and-comment rulemaking but, rather, an informal agency adjudication resulting in a final decision. (See 5 U.S.C. 551(7) [of the APA]).

<sup>19</sup> See also *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 448 (9th Cir. 1994) (“[B]ecause adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.”); Richard J. Pierce, Jr., *Administrative Law Treatise* 304 (4th ed. 2002) (“What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitively touched by it; while adjudication operates concretely upon individuals in their individual capacity.”).

<sup>20</sup> FLPMA § 307(b), 43 U.S.C. § 1737(b), gives the Department general authority to enter into “contracts and cooperative agreements involving the management, protection, development, and sale of public lands.”

cause of action in favor of third parties,<sup>21</sup> that provision does not diminish the substantive rights and responsibilities that the MOU imposes on DOI, the State of Utah, and Utah local government entities.

Second, in the words of *Troy Corp. v. Browner*, above, the Utah MOU is a substantive rule because it “‘effect[s] a change in existing law or policy’ . . . and ‘grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests.’” The Utah MOU is not like the MOU between the Korean War Veterans Memorial Advisory Board and the American Battle Monuments Commission in *Lucas v. United States Army Corps of Eng’rs*, 1991 WL 229941 at \* 4 (D.D.C. 1991), for example, which the court found was “written to establish procedural guidelines rather than to impose limitations on the Board’s statutory authority” and thus was not a substantive rule. Nor is the Utah MOU like the MOU in *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), between DOI’s Office of Surface Mining, EPA, the U.S. Army Corps of Engineers, and a state environmental agency. That MOU expressed the agencies’ interpretation of certain regulations and was challenged as being a substantive rule that “initiate[d] a profound change in the [existing] regulatory program” without compliance with notice and comment requirements. *Id.* at 654. The court ruled that the MOU was an interpretive rule, not a substantive rule, because the MOU itself “disavow[ed] any substantive effect”<sup>22</sup> and because the court, deferring to the interpretation of the MOU agencies charged with administering the relevant statutes, found that the MOU simply codified the agencies’ current practice and thus “merely reminds affected parties of existing duties . . .” *Id.* at 655.<sup>23</sup>

The Utah MOU stands in stark contrast to the MOUs in *Lucas* and *Bragg*. Unlike the MOUs in those cases, the Utah MOU does impose binding obligations—on DOI and Utah. And unlike those cases, the Utah MOU also works changes in existing law and policy—pertaining to the recognition, management, and validity of R.S. 2477 rights-of-way. In broadest terms, the Department will now recognize and validate R.S. 2477 rights-of-way by applying the substance and procedures applicable to FLPMA § 315 disclaimers, and R.S. 2477 rights-of-way acknowledged under this process will be given the same effect as lands or interests disclaimed under FLPMA § 315: the United States will be estopped from asserting a claim as to them. *See* 43 C.F.R. § 1864.0-2(b).

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<sup>21</sup> The Utah MOU states that it “shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person. This MOU shall not be construed to create any right to judicial review involving the compliance or noncompliance of the State of Utah, Utah counties, the United States, its agencies, its officers, or any other person with the provisions of this MOU.” Utah MOU at 5.

<sup>22</sup> The MOU provided in part that “[t]he policy and procedures contained in this MOU are intended solely as guidance and do not create any rights, either substantive or procedural, enforceable by any party. *This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.*” 72 F.Supp 2d. at 654-55 (emphasis in original).

<sup>23</sup> The practice of judicial deference, in certain circumstances, to the statutory interpretation of an agency charged with administration of the statute is discussed in Part II of this opinion.

As the MOU recognizes, this represents a significant change from the Department's existing policy in recognizing R.S. 2477 rights-of-way—the Babbitt Policy—which will no longer apply to R.S. 2477 rights-of-way covered by the MOU. We identify below examples of some of the specific changes effected by the Utah MOU.

a. Changes in standards for recognition and validation of R.S. 2477 rights-of-way

As discussed above, the Utah MOU identifies the criteria for “roads” that will be considered “eligible” for “acknowledgment” as valid R.S. 2477 rights-of-way. While the Department states that the disclaimers it issues under the Utah MOU will “essentially preserve the status quo,” in fact several of these criteria represent a departure from prior case law and/or longstanding Department policy—as the Department seems to recognize by stating that its new approach will only “essentially” preserve the status quo and that “[m]ost” but not all asserted R.S. 2477 claims in the West satisfy the R.S. 2477 “construction” and “highway” requirements under “almost” any statutory interpretation. See DOI Response to Sen. Bingaman at 1; Utah MOU at 1. For example, the Utah MOU criterion that a road have been in existence prior to FLPMA's enactment in 1976 and be in current use is equivalent to the “continuous use” standard for R.S. 2477 “construction” urged by Utah counties but rejected in *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 147 F. Supp. 2d 1130 (D. Utah 2001), *appeal dismissed*, 2003 WL 21480689 (10th Cir. 2003) (*SUWA*). As BLM successfully argued in *SUWA*, the term “construction” in R.S. 2477 requires some form of purposeful, physical building or improvement, not simply continuous use. As the court explained, “[a] highway right-of-way cannot be established by haphazard, unintentional, or incomplete actions. . . . [T]he mere passage of vehicles across the land, in the absence of any other evidence, is not sufficient to meet the construction criteria of R.S. 2477 and to establish that a highway right-of-way was granted.” *Id.* at 1138-39. See also *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1227 n.5 (D. Utah 2000) (adopting Department's interpretation of “construction” as meaning actual building and more than mere use).

The Utah MOU also changes the meaning of the basic R.S. 2477 term “highway,” by equating it with the term “road.” Utah MOU at 1. Courts have not always equated the two terms. In *SUWA*, for example, the court disagreed that highways could be established by the mere passage of wagons, horses, or pedestrians and accepted the Department's definition of “highway” as “a road freely open to everyone; a public road.” 147 F. Supp. 2d at 1143. The court also agreed with the Department that a road must be a significant one to be an R.S. 2477 highway: “It is unlikely that a route used by a single entity or used only a few times would qualify as a highway . . . a highway connects the public with identifiable destinations or places.” *Id.*

Finally, the Utah MOU changes the terms under which R.S. 2477 rights-of-way claims will be processed. In order to obtain recognition of its R.S. 2477 right-of-way, the claimant must agree to reimburse BLM's costs of processing the application. As a neighboring state has objected to the Secretary of the Interior, “[a]n RS-2477 right-of-way arises from a statutory grant and is not a right-of-way permit for which [the

Department] is authorized to charge processing fees.”<sup>24</sup> Whether or not such a fee is legally authorized, it represents a new prerequisite to obtaining recognition by the Department of an R.S. 2477 right-of-way and thus does not simply “remind” applicants of an “existing duty” in the way that an interpretive rule does. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1992); see *Five Flags Pipeline Co. v. United States Dep’t of Transp.*, 1992 WL 78773 (D.D.C. 1992) (Department of Transportation fee schedule was legislative rule because it “did not merely ‘remind’ the pipeline companies of an ‘existing duty.’ Rather, the schedule created an entirely new obligation to pay fees in precise amounts based on a specific mathematical computation that did not previously exist.”).

b. Changes in management standards for valid R.S. 2477 rights-of-way

The Utah MOU also sets standards for management of valid R.S. 2477 rights-of-way different from the standards set by at least some courts. As the Utah MOU explains, road management includes “road width and ongoing maintenance levels . . .” Utah MOU at 3. Courts have found that the appropriate standard for determining what maintenance or improvements an R.S. 2477 holder may undertake to expand the scope of a right-of-way is a “reasonable and necessary” standard. See, e.g., *Sierra Club v. Lujan*, 949 F.2d 362, 364, 369 (10th Cir. 1991); *United States v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000). By contrast, the Utah MOU adopts a ground-width disturbance standard, see Utah MOU at 3, which the *Garfield County* court explicitly rejected, stating that “[t]he law simply demands a more thoughtful standard than that.” *Id.* at 1232. Further, courts have measured the extent of an R.S. 2477 right-of-way as of the date of FLPMA’s enactment or when the underlying lands were “reserved for public uses,” whichever is earlier. See *Garfield County*, 122 F. Supp. 2d at 1228-29; *Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (10th Cir. 1988). The Utah MOU, by contrast, measures as of the date of the MOU—April 9, 2003. Utah MOU at 3; see also Utah MOU Guidance at 5.

The Department asserts that the Utah MOU is not a substantive rule subject to the prohibitions in Section 108. It states that use of the FLPMA § 315 disclaimer process in concert with the MOU does nothing more than provide a procedure for acknowledging or denying the validity of R.S. 2477 claims, a procedure in lieu of litigation of quiet title claims or takings claims in court. See DOI Response to Sen. Bingaman at 1, 4. The Department appears to be asserting that the Utah MOU is a procedural rule under the APA—“rules of agency organization, procedure, or practice,” see 5 U.S.C. § 553(b)(3)(A)—that would not be prohibited by Section 108. The Department is correct that procedural rules do not require notice and comment, are not substantive rules, and would not be covered by Section 108. However, as the court noted in *Public Citizen v. Department of State*, 276 F.3d 634, 640-41 (D.C. Cir. 2002), rules that “encode[] a substantive value judgment” are substantive and not procedural. The Utah MOU does considerably more than set procedural guidelines; it prescribes a process and substantive standards for recognizing and determining the

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<sup>24</sup> Letter from Executive Director, Colorado Department of Natural Resources, to Secretary of the Interior (May 15, 2003) at 2.

validity of R.S. 2477 rights-of-way. As the Department itself emphasizes in its Utah MOU Guidance, the MOU establishes binding legal requirements by which it will review disclaimer applications and “prepare a draft decision that documents whether the claimed right-of-way *meets the legal requirements under R.S. 2477 and the provisions of the MOU. . . .*” *Id.* at 5.

Our conclusion that the Utah MOU is the type of “final rule or regulation” that Congress intended to cover in Section 108 is confirmed by its similarity to the 1994 DOI proposed rule that prompted Congress to enact Section 108 in the first instance. As the court observed in *Garfield County*, in passing Section 108, “Congress was concerned with rule-making concerning the *process* for deciding the validity of R.S. § 2477 claims.” 122 F. Supp. 2d at 1237 (emphasis added). Like the Utah MOU, the 1994 proposed rule outlined a process for determining which R.S. 2477 rights-of-way were validly acquired. The rule was to put in place a “formal administrative process by which those who claim R.S. 2477 rights-of-way can have the Department make binding determinations of their existence and validity.” *See* 59 Fed. Reg. at 39216. Like the Utah MOU, the proposed rule also defined the R.S. 2477 statutory terms “highway” and “construction,” noting that these had “not been defined completely or consistently, resulting in uncertainty about the exact nature and extent of the grant.” *Id.* at 39217. Finally, the Department has described the Utah MOU as “an important first step towards resolving decades of conflict over the status of roads in the State of Utah” and “a reasonable approach that will allow us to clarify ownership of some county roads.” DOI Response to Sen. Bingaman at 1. These are the same sort of reasons Secretary Babbitt presented in support of the 1994 proposed rule that led to the Section 108 prohibition.<sup>25</sup>

In sum, we conclude that the Utah MOU is a final rule or regulation prohibited from taking effect by Section 108. It is a substantive rule under the APA and pertains to the recognition, management, and validity of R.S. 2477 rights-of-way. The Section 108 prohibition stemmed from congressional intent to prevent implementation of just such processes and standards.

## II. Authority to Use FLPMA § 315 to Disclaim Interests in R.S. 2477 Rights-of-Way

The second major legal concern with respect to the Department’s recent R.S. 2477 actions is whether, apart from the prohibition of Section 108, the Department may use the authority of FLPMA § 315 to disclaim U.S. interests in R.S. 2477 rights-of-way. No court has ruled on this question to date, and there are colorable arguments on both sides. Based on rules of statutory construction and deference, on balance, we conclude that FLPMA § 315 authorizes disclaimer of U.S. interests in R.S. 2477 rights-of-way.

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<sup>25</sup> *See* 59 Fed. Reg. at 39216-17. The stated purposes of the 1994 proposed rule are also similar to those for the Utah MOU. The proposed rule’s purposes were to: “(a) Establish procedures for the orderly and timely processing of claims for rights-of-way pursuant to R.S. 2477 over lands managed by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service; (b) Define key terms; (c) Establish public notice and appeal processes of claims for rights-of-way pursuant to R.S. 2477; and (d) Provide for the use of rights-of-way validly acquired pursuant to R.S. 2477, consistent with the management of adjacent and underlying Federal lands.” 59 Fed. Reg. at 39224. *Cf.* Utah MOU at 1-2; Utah MOU Guidance at 1.

As noted above, FLPMA § 315 authorizes the Department to issue a “disclaimer of interest or interests in any lands . . . where the disclaimer will help remove a cloud on the title of such lands” and one of three other conditions applies. Two of those conditions relate to riparian situations, *see* FLPMA §§ 315 (a)(2), (a)(3), and thus are not relevant to R.S. 2477 highway rights-of-way. The third condition is FLPMA § 315(a)(1), where “a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.” This is potentially applicable to creation of highway rights-of-way under R.S. 2477. Thus for the Department to be authorized to employ FLPMA § 315 to disclaim R.S. 2477 rights-of-way: (1) disclaimer must “help remove a cloud on the title of such lands”; and (2) “a record interest of the United States in lands [must have] terminated by operation of law or [be] otherwise invalid.” The Department has interpreted these requirements as applying to disclaim R.S. 2477 rights-of-way, and on balance, we conclude this is a reasonable interpretation that must be given considerable deference.

First, the Department asserts that disclaimer by the United States “will help remove a cloud on the title” of an R.S. 2477 right-of-way. Congress did not elaborate on the meaning of the phrase “cloud on the title” either in FLPMA § 315 or its legislative history. Under real property law, a “cloud on title” generally refers to an outstanding claim or encumbrance attached to real property that, if valid, would affect or impair the title of the owner of the property.<sup>26</sup> In this case, the Department posits, the “cloud” on title to a particular R.S. 2477 right-of-way results from the uncertainty surrounding whether it was established prior to the repeal of R.S. 2477 in 1976. DOI Response to GAO at 7; 68 Fed. Reg. at 496. As discussed above, R.S. 2477 was self-executing, meaning that no government approvals were necessary and typically no recording was made in public land records when an R.S. 2477 right-of-way was perfected by fulfillment of the statutory elements—“construction” of a “highway” over non-reserved public lands. If an R.S. 2477 right-of-way was not established over public lands, then the U.S. retained its 100 percent fee simple title in the lands—including interests in using and transferring the lands, interests in excluding others from trespassing on the lands, any mineral rights in the lands, and all other property interests. On the other hand, if an R.S. 2477 right-of-way was established, then one of the United States’ property interests—the right to exclusive use of the surface property covered by the right-of-way—was terminated by operation of law or became “invalid.” The lack of certainty about which of these circumstances exists at a given site can create a cloud that disclaimer of the U.S. interest will “help remove.” Although as DOI’s FLPMA § 315 regulations make clear, a disclaimer does not literally “grant, convey, transfer, remise, quitclaim, release or renounce any title or interest in lands,” it has the effect of a quitclaim deed in the sense that it acts as an estoppel against the United States asserting a competing claim to the property interest being disclaimed. *See* 43 C.F.R. § 1864.0-2(b). Thus issuance of a disclaimer for an R.S. 2477 right-of-way means the United States would no longer assert a competing claim to the right-of-way, removing a “cloud” on its “title.”

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<sup>26</sup> *Black’s Law Dictionary* 249 (7th ed. 1999).

Second, the Department asserts that the requirement for “a record interest of the United States in lands [to have] terminated by operation of law or [become] otherwise invalid” is satisfied if the conditions of R.S. 2477 were satisfied—that is, if, at some time between 1866 and 1976, there was “construction” of a “highway” over non-reserved public lands. At this point, in the Department’s view, the complete fee simple ownership of the United States in the land was altered to that of a holder of the servient estate. DOI Response to GAO at 10. In property law parlance, the land became “burdened” by the right-of-way or easement and the owner of the land—the United States—was required to abstain from acts that impermissibly interfered with or were inconsistent with use of the easement. *See United States v. Garfield County*, 122 F.Supp. 2d 1201, 1243 (D. Utah 2000). Thus the unburdened fee interest of the U.S. was terminated or invalidated by creation of the R.S. 2477 right-of-way. *See Estes Park Toll-Road Co. v. Edwards*, 32 P. 549 (1893)(“After entry and appropriation of the right of way granted, and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it.”).

There are certain objections to this analysis. Some have argued that the holder of an R.S. 2477 right-of-way does not have technical title to the right-of-way, but only a usufruct right in it—the right to use property owned by another party<sup>27</sup>—and therefore FLPMA § 315 cannot be used to remove a cloud on it. However, the Department points out, and we agree, that “title” is a term often used synonymously with various types of ownership. DOI Response to GAO at 8; *see, e.g., Garfield County*, above, 122 F. Supp. 2d at 1241-42 (discussing the county’s ownership of an R.S. 2477 right-of-way while clarifying that R.S. 2477 did not grant the county fee simple title); *Dover Veterans Council v. City of Dover*, 407 A. 2d 1195, 1196 (S. Ct. N.H. 1979)(“Title” can denote any estate or interest, including a leasehold or merely the right of possession.). Thus we find the view that disclaimer of U.S. interests in an R.S. 2477 right-of-way would remove a cloud on its “title” for purposes of FLPMA § 315 is reasonable.

The Department’s interpretation has also been challenged by noting that, by its terms, FLPMA § 315 requires the “cloud” to be on title to “lands,” not on an interest in lands such as a right-of-way. According to this argument, Congress referred to “lands” and “interests in lands” as distinct concepts in FLPMA § 315, and under traditional rules of statutory construction, should be viewed as reflecting different meanings. 2A *Sutherland Statutory Construction* § 46:06 at 193-94 (6th ed. 2000).<sup>28</sup> Because, in their view, a disclaimer of an R.S. 2477 right-of-way would not remove a cloud on the title to the land underlying the right-of-way, the Department’s interpretation is inconsistent with FLPMA § 315.

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<sup>27</sup> *See Black’s Law Dictionary* at 1542.

<sup>28</sup> It is also argued that the terms “lands” and “interests in lands” are used as distinct concepts in other provisions of FLPMA, as well as in other land management statutes. *See, e.g.,* FLPMA § 205, 43 U.S.C. § 1715(c) (“lands and interests in lands”); FLPMA § 206(a), 43 U.S.C. § 1716(a) (“a tract of land or interests therein”); FLPMA § 206(b), 43 U.S.C. § 1716(b) (“title to any non-Federal land or interests therein in exchange for such land, or interest therein”); 43 U.S.C. § 1716(i) (“exchange lands or interests in lands”); 16 U.S.C. § 79c; 16 U.S.C. § 271a; 16 U.S.C. § 396f note (e); 16 U.S.C. § 410hh-1 note (a)(6); 16 U.S.C. § 460uu-46; 16 U.S.C. § 521c.

In our view, the language of FLPMA § 315 does not clearly indicate that Congress used these different references to capture discrete, contrasting concepts. In this regard, FLPMA § 315 authorizes the Department to disclaim an “interest or interests in any lands” where the disclaimer will help remove a cloud on the title of “such lands.” Here, the reference to “such lands” potentially refers either just to the land itself or to both the land as well as lesser interests in the land. Since the Department promulgated its original 1984 regulations implementing FLPMA § 315, it has defined the term “lands” to include “lands and interests in lands . . .” 43 C.F.R. § 1864.0-5(e). Given that the terms “lands” and “interests in lands” are closely connected concepts, it is plausible to conclude, as the Department did when it promulgated the 1984 regulations and today, that “lands” in FLPMA § 315 means “lands and interests in lands.” We are reluctant to conclude that the Department’s statutory interpretation is impermissible.

The legislative history of FLPMA § 315 introduces some doubt on the Department’s position. In the final analysis, however, it is inconclusive. The Department first proposed what became FLPMA § 315 in a draft public lands bill submitted to Congress, which Senator Jackson introduced by request on February 28, 1973.<sup>29</sup> Before FLPMA was enacted, the Secretary of the Interior had no express statutory authority to issue recordable documents disclaiming interests in land.<sup>30</sup> The General Land Office, BLM’s predecessor, had a need to issue disclaimers as a kind of correction device, which it did even though it had no express authority. The purpose of § 315 was, as the Senate Committee on Interior and Insular Affairs reported to the Senate, to authorize the Secretary “to issue documents of disclaimer when the United States has no interest in certain lands . . .”<sup>31</sup> The Senate report states that the section authorizes the Secretary to issue such documents in “three specified instances where he finds no Federal interest and where there is a cloud on the title.”<sup>32</sup> This authority is necessary, the report continues, to eliminate the need for judicial or legislative relief “in those cases where the United States asserts no ownership or interest.”<sup>33</sup> The House report is to the same effect.<sup>34</sup> It is not clear from these statements, however, whether the Congress intended disclaimers to be issued when the United States has

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<sup>29</sup> S. 1041, § 308, reprinted in Comm. on Energy and Natural Resources, 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at 1508-1509 (Comm. Print 1978). The language of section 315(a) was substantially the same as what later became law, but did not include the phrase “or is otherwise invalid.”

<sup>30</sup> See H.R. Rep. No. 94-1163, at 11 (1976); S. Rep. No. 94-583, at 50 (1975); S. Rep. No. 93-873, at 42 (1974) (“[U]nder existing law, the Secretary of the Interior has no authority to issue any kind of document showing that the United States has no interest in certain lands.”). See also *Soda Flat v. Hodel*, 670 F. Supp. 879, 887-889 (E.D. Cal. 1987).

<sup>31</sup> S. Rep. No. 94-583, at 25 (1975); S. Rep. No. 93-873, at 24 (1974).

<sup>32</sup> S. Rep. No. 94-583, at 50; S. Rep. No. 93-873, at 41. See also Letter from Acting Secretary of the Interior to Spiro Agnew, reprinted in Comm. on Energy and Natural Resources, 95th Cong., Legislative History of the Federal Land Policy and Management Act of 1976, at 1605 (“It would provide authority to issue a document of disclaimer of interest in land to which the United States no longer claims an interest.”).

<sup>33</sup> S. Rep. No. 94-583, at 51.

<sup>34</sup> H.R. Rep. No. 94-1163, at 11 (1976).

no remaining interests in the *interest* being disclaimed or whether there must be no remaining interests in the *land* at all. So viewed, the legislative history neither supports nor contradicts the Department's interpretation of § 315<sup>35</sup> as allowing it to disclaim R.S. 2477 rights-of-way even when some federal interest in the property at issue will remain.<sup>36</sup>

A final argument against the Department's interpretation is that no "record interest of the United States has terminated by operation of law," as required by the statutory language. This view asserts that when R.S. 2477 granted rights-of-way or easements over public land, dominant and servient estates were *created*, but no record interests of the U.S. were *terminated*. The Department states, however, and we agree, that the creation of an easement involves the creation of two separate interests in real property: a servient estate, here owned by the United States, and a dominant estate, here owned by the holder of the R.S. 2477 right-of-way. DOI Response to GAO at 10; *see, e.g., C/R TV v. Shannondale*, 27 F.3d 104, 107 (4th Cir. 1994). Under such circumstances, it follows that upon the creation of these two interests, a record interest of the United States terminated: its interest in exclusive use of the surface property over which the right-of-way ran.

We recognize that the Department's interpretation of FLPMA § 315, as potentially applying to R.S. 2477 rights-of-way, is a novel one. That fact alone, however, should not condemn it. It is not uncommon for the scope and application of a grant of remedial administrative authority such as FLPMA § 315 to evolve with changing factual circumstances. Moreover, in analyzing whether FLPMA § 315 authorizes the Department to do what it seeks to do under the Utah MOU, we are mindful of the considerable weight that should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *United States v. Mead*, 533 U.S. 218 (2001); *Udall v. Tallman*, 380 U.S. 1 (1965). Indeed, under bedrock principles of statutory construction and judicial deference in cases involving agency action, where Congress has not spoken clearly to the precise question at issue—for example, where a statute is ambiguous or silent—courts defer to the interpretation of an agency charged with implementing the statute if the interpretation is not unreasonable, nor arbitrary or capricious. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This rule applies even where a court believes that there is a more reasonable interpretation, and even where the agency's interpretation is a

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<sup>35</sup> Similarly, the Department's regulations, stating that "[t]he objective of the disclaimer is to eliminate the necessity for court action or private legislation in those instances where the United States asserts *no ownership or record interest*" are not conclusive on this point. 43 C.F.R. § 1864.0-2(a) (emphasis added).

<sup>36</sup> One final legislative history argument has been made in opposition to the Department's interpretation that § 315 authorizes it to disclaim R.S. 2477 rights-of-way. As noted above, Congress repealed R.S. 2477 in FLPMA while preserving already perfected R.S. 2477 rights-of-way. Congress also created Title V of FLPMA to establish a process for granting *new* rights-of-way over public land. It has been argued that in light of the considerable attention Congress focused on rights-of-way in FLPMA, if Congress had meant to allow the Department to disclaim R.S. 2477 rights-of-way through the use of § 315, it would have said so. While this view may have some merit, we find it just as plausible to conclude that Congress did not consider the issue at all, especially because no explicit statutory solution was provided in FLPMA for the resolution of R.S. 2477 claims.

departure from past practice. *See, e.g., American Fed'n of Govt. Employees, Local 3884 v. FLRA*, 930 F.2d 1315, 1324 n. 12 (8th Cir. 1991).

As applied here, principles of statutory construction and deference firmly embedded in administrative law counsel substantial deference to DOI's interpretation of FLPMA § 315. As discussed above, a number of terms in FLPMA § 315 are ambiguous, notably, "lands," "interests in lands," and "cloud on title."<sup>37</sup> Although the Department's interpretation is not necessarily the only reasonable one, DOI is the agency responsible for management of the public lands and for administration of FLPMA. For the reasons discussed above, we find the Department's interpretations of these terms and of FLPMA § 315 as a whole to be reasonable.

#### CONCLUSION

In sum, we conclude that the 2003 Disclaimer Rule is not a final rule or regulation covered by the prohibition in Section 108, but that the Utah MOU is covered because it is a substantive rule under the APA that "pertain[s] to the recognition, management, and validity" of R.S. 2477 rights-of-way. We also conclude that, independent of this Section 108 prohibition, the Department has authority under FLPMA § 315 to disclaim interests in R.S. 2477 rights-of-way.

February 6, 2004

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<sup>37</sup> To the extent that DOI has filled the statutory gaps through notice and comment rulemaking as it has with respect to the definition of "lands," we view such interpretation as conclusive under *Chevron* and *Mead*.



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### ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

#### Alaska DNR RS 2477

[AS 19.30.400. Identification and acceptance of rights-of-way.](#) [includes list of 659 accepted RS2477 routes]

[11 AAC 51.055. Identification of R.S. 2477 Rights-of-Way](#)

[11 AAC 51.100. Management of Public Easements, Including R.S. 2477 Rights-of-Way](#)

[11 AAC 53.110. General survey standards - Class III required for RS 2477, seems excessive!](#)

#### STATE OF ALASKA COMMENTS ON PROPOSED RULES RS 2477 RIGHTS-OF-WAY

Published at 59 Fed.Reg. 49216 et seq. (August 1, 1994)

#### ALASKA RS 2477 TRAILS

The State of Alaska has achieved Quiet Title to the Harrison Creek - Portage Creek Trail (RST 8) in the Circle Mining District. Because the original trail has been moved many times to accommodate active mining since 1976, (the deadline for identification of existing rights-of-way), the State has entered into a consent decree accepting a mutually agreeable 60-foot right-of-way to substitute for abandonment of portions of the existing trail. This was one of 11 of the 620 "Qualified" trails that was "Certified" as a test case, and was selected for litigation because it had the broadest potential for setting precedent. The Department of Law and the Division of Mining, Land & Water require funds for this legal effort to file "quiet title" actions in court to determine the validity of the routes.

#### U.S. v VOGLER

1988 granted permanent injunction prohibiting placer miner from operating off-road vehicles in national preserve without first obtaining access permit and from conducting placer miner operations without submitting and obtaining approval of mining operations plan. Miner appealed. The Court of Appeals, held that: (1) Federal Government had authority to regulate access and mining within Alaska's national parks; (2) regulations did not deprive placer miner of "adequate and feasible" access to his claims and were within power granted under property clause; (3) Federal Government had authority to regulate travel on trail, even assuming it was established right-of-way; and (4) claim alleging unconstitutional taking of property rights was not ripe for judicial resolution.

#### SHULTZ v DEPARTMENT OF ARMY

Shultz v. Army, 1993, concerning a right-of-way claim across Fort Wainwright, established that the public right-of-way between the origin and termini of the route need not be absolutely fixed, and upheld the broad definition of a highway found in state law. On rehearing, the 9th Circuit Court of Appeals reversed its original ruling in the Shultz case. However, the legal reasoning that produced that original decision has been used to support other cases. Paul G. Shultz appeals the district court's judgment in favor of the government in his quiet title action under 28 U.S.C. S 2409a. Shultz argued that he has a right-of-way across Fort Wainwright to get back and forth between Fairbanks and his property under either R.S. 2477, 43 U.S.C. S 932, or Alaska common law, or both. Because we ultimately agree with the district court that Shultz has not sustained his burden to factually establish a continuous R.S. 2477 route or a right-of-way under Alaska common law, we affirm the district court. We do not reach Shultz's argument that the district court erred by holding that his action was time-barred by 28 U.S.C. S 2409a(g).

Exchange with NPCA on RS 2477 in Wrangell St. Elias News 5/04

## 2/03 FEDERAL RECORDABLE DISCLAIMER REGULATION

1/25/03 - Off-road organizations. San Bernardino County. petition to own areas - DON THOMPSON, Associated Press - The county's claim was the nation's first under the new federal regulation adopted by the Interior Department in February.

## OTHER RS 2477 RESOURCES

GOOGLE SEARCH: RS2477 AND SALT LAKE TRIBUNE -- A bonanza of information on the unfolding RS 2477 process in Utah

4/9/02 - MOU U.S. Dept of the Interior and State of Utah - <http://www.doi.gov/news/mours2477.htm>

7/16/03 - Congress likely to kill roads deal, Christopher Smith, Salt Lake Tribune - WASHINGTON -- Congress is poised to kill Utah's landmark agreement with the Department of Interior to transfer rights to old roadbeds across federal lands to counties as the House begins debate on the Interior appropriations bill today, with a vote expected Thursday.

8/17/03 - History essential to understand road rights, Alan D. Gardner, Salt Lake Tribune - In April the Department of Interior announced that it had signed an MOU Utah resolving the road issue (R.S. 2477). Southern Utah Wilderness Alliance and other extreme environmental groups (including some of the groups that want to drain Lake Powell) are very strongly opposed to this decision, stating that these "aren't roads, but ways." It seems as if their goal is to eliminate public access to public land. To make a fair judgment on this issue, some background history is essential. As each new area of this country developed, the federal government owned all of the land. Gradually land was sold or homesteaded, with almost all land transferring to private ownership. However, in the Western states, this transfer from federal to private ownership in many cases was never completed.

5/20/03 - Greedy Socialists - Salt Lake Tribune - Until wilderness advocates and R.S.2477 opponents tell the truth about socioeconomic impacts on rural communities and the tax base of Utah, I and many other rural citizens will remain angry with greedy, socialistic environmental groups striving to take away our rights to "life, liberty and the pursuit of happiness."

7/29/97 - Letter to GAO about RS2477

Utah County Roads (R.S. 2477) Presentation BE PATIENT! LONG TIME TO LOAD (12 MB Adobe PDF Document)

4/20/03 - Finding Common Ground on County Roads - Op-Ed by Governor Mike Leavitt - Imagine the confusion that would result if the county recorder's office burned down and ownership records for the entire community were lost. Utah finds itself in a somewhat similar situation with respect to county roads. Our mostly rural transportation system used by ranchers, miners, hikers, hunters, federal land managers, county officials, tourists and others is caught in a divisive and costly legal battle over rights of way on potentially thousands of roads.

What is "Revised Statute R.S. 2477"? - National Public Lands News

What is "Jarbidge South Canyon Road" ?

R.S. 2477 - BLM is proposing new rules to process "road claims" on public lands. The subject law, a one-sentence, 21-word statutory provision, known as Revised Statute 2477, was passed on July 26, 1866. Twenty six years after its repeal by FLPMA, the process of asserting claims under the statute is far from consistent and has been the subject of litigation between the Federal government, the states and the counties. 43 CFR Part 1860 [WO-350-1864-24 1A] RIN 1010-AD50 Conveyances, Disclaimers and Correction Documents  
AGENCY: Bureau of Land Management, Interior. ACTION: Final rule.

<http://www.nplnews.com/fedregister/2003/jan62003-blm-rs2477.htm>

SUMMARY: The Bureau of Land Management (BLM) amends its regulations pertaining to recordable disclaimers of interest in land. We are amending the regulation by: removing the 12-year regulatory filing deadline for states; removing the requirement that an applicant be a "present owner of record" to be qualified under the Act; allowing any entity claiming title, not just current owners of record, to apply for a disclaimer of interest; defining the term "state" as it is used in this rule; clarifying how we will approve disclaimer applications involving another Federal land managing agency.

12/28/02 - [Little Wyo interest in old road law](#) - Casper Star Tribune - The state of Wyoming has not taken much interest in an old federal law making it possible for local governments to claim rights-of-way through federal lands.

RS 2477 in California

<http://www.death-valley.us/article500.html>

<http://www.death-valley.us/article499.html>

[http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=18049](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=18049)

## ACCESS CLOSURE TO PATENTED PRIVATE LAND IN LOWER 48 STATES

9/11 - Catron Co, NM - [Forest Service Probes Road Grading](#) - There are 4 parcels of unimproved, uninhabited tracts of land located on the San Francisco River that are surrounded by national forest lands. The road servicing these tracts is an old historic road (RS 2477) connecting Glenwood with Reserve. This 17 mile stretch of road has not been maintained by the county for many years. However travelers and landowners have continually gone up the river anyway. The Gila Forest wishes to purchase this property and has had it appraised. Our county land plan calls for no net loss of private land. Private land is our tax base and provides a nucleus for any future economic benefits. One of the landowners would not consent to sell. This land owner received a letter from Gila Forest Supervisor Kelly M. Russell stating that the area had been designated as the Devils Park Road-less area. He was informed that his only access was by foot or horseback. He could be granted a vehicle permit if he consented to pay the forest service to do a follow-up NEPA study. Nobody else, to our knowledge was informed of this road-less designation including Catron County. One of the strongest rights in the U.S. is to have full access to ones private land.

*For More Information Contact:*  
**American Land Rights Association**  
Tel: 360-687-3087  
FAX: 360-687-2973

[\[\\_private/navbar.htm\]](#)

Send mail to [alra@pacifier.com](mailto:alra@pacifier.com) with questions or comments about this web site.  
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# STATE OF ALASKA

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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March 28, 2012

The Honorable Paul Seaton  
Co-Chairman, House Resources Committee  
State Capitol, Room 102  
Juneau, Alaska 99801-1182

The Honorable Eric Feige  
Co-Chairman, House Resources Committee  
State Capitol, Room 126  
Juneau, Alaska 99801-1182

Re: HJR 40

Dear Representatives Seaton and Feige:

On Monday the House Resources Committee heard HJR 40, addressing RS 2477 rights-of-way and other matters. Included in the resolution is language encouraging the Governor to re-establish federalism sections within the Departments of Law, Natural Resources, and Fish and Game. I am informed that the Committee would like to know whether the Department of Law supports creation of a federalism sub-section.

While the Department welcomes the Legislature's strong support and encouragement to defend State title to RS 2477 rights-of-way and to pursue other challenges to federal overreach, creation of a federalism section is unnecessary.

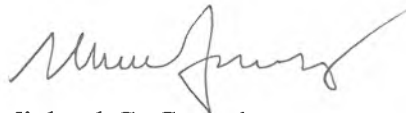
The Department established a statehood defense subunit within its Natural Resources Section during the Hickel administration to initiate several state's rights cases against the federal government. Although the functions of this subunit were later integrated into other sections, the focus of the former subunit has continued. The Department emphasizes federalism issues, which pervade many of the areas in which our sections work, including Natural Resources, Environmental, and Oil, Gas & Mining Sections. The attorneys in these sections have the specialized backgrounds necessary to address the issues that arise from state/federal jurisdictional disputes. Maintaining the Department's existing administrative structure gives the flexibility to assign federalism matters to the attorneys with the most expertise in the particular contexts in which they

arise. It is a priority of mine to continually coordinate Law's staff so that each of the issues raised in our cases are addressed by the most capable and experienced attorneys.

Under the Parnell administration, Law and all State agencies are closely monitoring federal actions that could impact the State. Law is working with other agencies to pointedly comment on federal land management plans, environmental impact statements, and regulatory proposals; to assure the State is proactively conducting scientific studies; and to litigate where necessary to enforce the State's right to access and develop natural resources. We also actively team with other Western states to oppose unnecessary federal action. For example, nine other states joined an amicus brief that Alaska drafted for the recent *Sackett v. EPA* case in U.S. Supreme Court, to urge the Court to overturn an EPA action that threatened the property rights of an Idaho couple. We have dedicated an attorney to RS 2477 cases and assigned others to assert the State's navigability claims, challenge the application of the Forest Service 2001 Roadless Area Conservation Rule to the Tongass and Chugach National Forests, resist unwarranted listings under the Endangered Species Act, oppose the EPA's extraordinary assertions of federal jurisdiction under the Clean Water Act, and pursue the development of oil and gas resources on the Outer Continental Shelf.

I assure you that the Department's focus on defending Alaska's statehood rights will continue under my leadership.

Sincerely,



Michael C. Geraghty  
Attorney General

**Testimony re House Joint Resolution 40  
April 2, 2012, LIO Anchorage – 1 pm**

My name is Malcolm Roberts. I have a consulting firm called Malcolm B. Roberts & Associates, and I am a Senior Fellow at the Institute of the North. I am representing myself. *My address is 2001 Churchill Drive, Anchorage, AK 99517. My email address is mbroberts@gci.net.*

**Co-Chairmen Feige and Seaton and members of the House Resources Committee, thank you for holding this hearing and accepting public testimony.**

**I commend Rep. Wes Keller, and his co-sponsors for addressing two critical issues in HJR40 – issues that will have significant ramifications for Alaska’s resources until the end of this century and probably well beyond.**

**First, Valid Existing Rights of Access across federal properties in Alaska – which make up two-thirds of our state.**

**Second, the need to demand that the Federal government lives up to the promises made to the Alaska people in 1958 in our Statehood Compact.**

**Senator Stevens once commented, “Alaska has more disputes with the Federal government daily than most states have annually. And these disputes are primarily over access.”**

**As members of the Resource Committee, you understand all too well that having vast resources means nothing if you can’t get to them.**

**I am not referring only to resources on federal land – but on state land, Native corporate land and Native allotments, and what is left of other private inholdings.**

**The good news is that we have legal rights of access that belong to the State of Alaska and thereby its citizens.**

**These rights are based on proven historic trails and were authorized by federal law Revised Statute 2477, part of the Mining Act of 1866.**

**These rights should be asserted by the state, and we should back up Utah and other states in their efforts to do the same.**

**Last Friday, it appeared that the Department of Law was suggesting that you back off the second recommendation regarding defense of our rights agreed to in our Statehood Compact. I strongly disagree.**

**I respectfully urge this committee to call for a re-establishment of a Division in the Department of Law for this purpose.**

**Governor Hickel set up such a Division in the early 1990s.**

**This Division should be a permanent arm of the State's Department of Law, and it should be staffed by the best and brightest attorneys we can attract.**

**In my 42-year career in Alaska, I have studied debated and written reports on both of the issues addressed in HJR40 - Access and the Compact.**

**I was recruited in 1985 to head a Task Force to research existing RS2477 rights-of-way throughout Alaska by Senator Jack Coghill, the father of today's Senator John Coghill.**

**The senior Senator Coghill, as Chair of the Senate Transportation Committee, was determined to preserve the State's rights of access and achieved a great deal in that regard.**

**RS2477 has been utilized throughout the western states to provide public use for everything from**

- walking trails to remote fishing streams and lakes**
- to access to the banks of state-owned navigable waters**
- to highway construction on public lands and what we now call "roads to resources."**

**Note: The statutory definition of "highway" in Alaska's unique transportation system includes roads, trails, streets and bridges.**

**Our first assignment as the RS2477 Task Force was to provide the National Park Service with the information we collected indicating the State's valid existing rights of access, so that it would be included in their federal planning documents.**

**Many draft federal plans were revised to include our work, including maps of known RS 2477 rights-of-way and trail descriptions in 9 of the 13 National Park general management plans.**

*(The missing 4 had been completed prior to June 1985 when our Task Force began its work).*

**Our mission was later expanded to provide data so that these rights-of-way could be recognized in federal planning documents being prepared as part of ANILCA's mandate – including Refuge Plans by the U.S. Fish and Wildlife, Wild and Scenic Rivers, and conservation areas managed by the Bureau of Land Management, and the U.S. Forest Service.**

**With the release of our final report on January 15, 1987 we had identified over 600 valid RS 2477s rights-of-way on federal lands within the State.**

**However in the ensuing years, the federal government insisted that Alaska must litigate when it wants to assert an RS 2477 right-of-way.**

**It is patently absurd to require that we have to sue to use something that is already ours.\***

**It's like saying that in spite of the Bill of Rights, American citizens have to sue the Federal Government to get permission to speak!**

**The fears that motivated the Federal establishment in Alaska were partly the result of a gaff (which I believe was deliberate) by opponents to state access within and across federal lands within the Bureau of Land Management.**

**They published a report and put a map on the cover that included ALL of the possible or proposed roads, trails and rail lines throughout Alaska.**

**It became known as the "Spaghetti Map."**

**And it made the State of Alaska look like downtown Los Angeles.**

The backlash was strong...even from many Alaskans who support access and resource development. **It paralyzed the process.** As a result, Alaska has retained its standing as having fewer miles of roads than our smallest state, Rhode Island.

**Partly for this reason, when we wrote our final report for the RS2477 study in the 1980s, we took a difference tack.**

**We recommended that the State focus on only 8 vital Transportation Corridors to be asserted and set aside for future use.**

**That recommendation is still valid and should be pursued.**

**If I were to read the names of these corridors, most of you would understand why they are important to the Alaska people both to residents of rural Alaska, and to our economy as a whole.**

Here's the list:

1. The Arctic Coastal Plain – east of Prudhoe to the Canadian border
2. Access from Nenana to Kobuk to Ambler – I trust that this committee is aware of the vast copper reserves in Ambler.
3. Along the Upper Cook Inlet (started at Beluga)
4. The Yukon/Kuskokwim portage
5. From the Susitna River to McGrath
6. The Kantishna spur - into Denali National Park
7. From Circle to Eagle
8. And the so-called Aleutian Crossing

**Regarding the Statehood Compact, I staffed a committee of Commonwealth North, the bi-partisan Anchorage-based public policy organization, in the early 1980s that studied Alaska's Compact with the federal government.**

The members of that committee included Anchorage Times publisher Bob Atwood, Governor Wally Hickel, Judge James Singleton, former Natural Resources Commissioner and State Senator Irene Ryan, and planner/environmentalist Dr. David Hickok... to name a few.

**Their report was published as a small book by APU Press, called "Going Up In Flames - The Promises of Alaska Statehood under Attack". I commend it to you.**

**It should be required reading of all those elected or appointed to public office prior to asking them to swear to uphold the Alaska Constitution.**

Later as Cabinet Secretary in Governor Hickel's second term from 1990 to 1994, I worked closely with the Governor as he and his legal team launched four major lawsuits against the federal government -- lawsuits that addressed egregious federal violations of Alaska's Statehood Compact.

Unfortunately, these cases were filed late in Governor Hickel's second term, too late for the Hickel Administration to follow through. And those who followed were lukewarm in their support.

**A key to most of the issues you must deal with is ANILCA, the Alaska National Interest Lands Conservation Act of 1980.**

**In 2002 Senators Ted Stevens and Frank Murkowski, through the Department of Interior, commissioned the Institute of the North to prepare a detailed 180-page ANILCA Training Curriculum for land managers, staff, in-holders, and all interested Alaskans.**

Since then, the Institute has used that Curriculum to conduct executive training sessions on ANILCA - in fact one was held last month in Fairbanks and another began this morning at the Hotel Captain Cook here in Anchorage.

**On page 60 of that Training Curriculum, it quotes Section 1109 of ANILCA that says "nothing in this title (the transportation title, #XI) shall be construed to adversely affect any valid existing right of access."**

**And Section 1110 (b) state's categorically that "Adequate and feasible access to inholdings is guaranteed."**

**And yet, these valid existing rights of access have, I dare say almost daily, been ignored or violated since the passage of ANILCA.**

**It's up to the State of Alaska to require the federal government to obey the law. This will only happen if the State creates a team of top attorneys who are committed to defend our rights and a Governor and an Attorney General who backs them up.**

**In sum, I support the passage of HJR 40 and respectfully urge this committee and this legislature not to leave it at that. There is much to be done.**

**Thank you.**

\* The opposite should be true. The feds should have to go to court if they want to stop us from asserting assert what we believe is ours and see if they prevail. I don't believe they will.